

No. 87-1555-CFX
Status: GRANTED

Title: James J. Burnley, IV, Secretary of Transportation,
et al., Petitioners
v.
Railway Labor Executives' Association, et al.

Docketed:
March 17, 1988

Court: United States Court of Appeals
for the Ninth Circuit

See also:
87-1631

Counsel for petitioner: Solicitor General

Counsel for respondent: Mann, Lawrence M., Miller III, Clinton
J., Ross, Harold A., Holsberry, W. David

Entry	Date	Note	Proceedings and Orders
1	Mar 17 1988	G	Petition for writ of certiorari filed.
3	Apr 7 1988		Order extending time to file response to petition until May 16, 1988.
4	Apr 8 1988		The above extension of time applies to all respondents.
7	Apr 14 1988		Brief amicus curiae of Natl. Railroad Passenger Corp. filed.
5	Apr 15 1988		Brief amicus curiae of Southern California Rapid Transit District filed.
6	Apr 15 1988		Brief amicus curiae of California Employment Law Council filed.
8	Apr 15 1988	G	Motion of Thomas Colley, et al. for leave to file a brief as amici curiae filed.
9	May 16 1988		Brief of respondents Railway Labor Exec. Association, et al. in opposition filed.
10	May 17 1988		DISTRIBUTED. June 2, 1988
11	May 23 1988	X	Reply brief of petitioner James J. Burnley, IV, Sec. Department of Transportation filed.
12	May 27 1988		REDISTRIBUTED. June 2, 1988
13	Jun 6 1988		Motion of Thomas Colley, et al. for leave to file a brief as amici curiae GRANTED.
14	Jun 6 1988		Petition GRANTED. The case is set for oral argument in tandem with No. 86-1879, National Treasury Employees Union v. Von Raab. *****
16	Jul 15 1988		Order extending time to file brief of petitioner on the merits until July 28, 1988.
17	Jul 19 1988		Joint appendix filed.
18	Jul 19 1988		Brief amici curiae of Private Truck Council of America, Inc., et al. filed.
19	Jul 21 1988		Brief amicus curiae of American Public Transit Assn. filed.
23	Jul 27 1988		Brief amicus curiae of Pacific Legal Foundation filed.
25	Jul 27 1988		Brief of petitioner James J. Burnley, IV, Sec. Department of Transportation filed.
26	Jul 27 1988		Brief amicus curiae of California Employment Law Council filed.
20	Jul 28 1988		Lodgings received. (11 copies).
21	Jul 28 1988		Brief amici curiae of National Railroad Passenger Corp., et al. filed.
22	Jul 28 1988		Brief amicus curiae of Equal Employment Advisory Council filed.
24	Jul 28 1988		Brief amici curiae of Thomas Colley, et al. filed.

Entry	Date	Note	Proceedings and Orders
27	Jul 28 1988	Brief amici curiae of Bendiner-Schlesinger Laboratory, et al. filed.	
29	Aug 25 1988	Order extending time to file brief of respondent on the merits until September 9, 1988.	
30	Aug 29 1988	Set for argument. Wednesday, November 2, 1988. (1st case) (1 hr). Set in tandem with 86-1879.	
31	Sep 9 1988	Brief amicus curiae of AFL-CIO filed.	
32	Sep 9 1988	Brief of respondents Railway Labor Executives' Assn., et al. filed.	
35	Sep 9 1988	X Brief amici curiae of ACLU, et al. filed.	
36	Sep 9 1988	X Brief amicus curiae of Aircraft Owners & Pilots Assn. filed.	
33	Sep 12 1988	Record filed.	
		* Certified copy of original record and proceedings, 5 volumes, and oversize #25 envelope.	
37	Sep 12 1988	Lodging received.	
34	Sep 13 1988	CIRCULATED.	
38	Oct 11 1988	X Reply brief of petitioner James J. Burnely, IV, Sec. Department of Transportation filed.	
39	Oct 28 1988	Letter from the Solicitor General received and circulated.	
40	Nov 2 1988	ARGUED.	

88-1555

FILED

MAR 17 1988

JOSEPH F. SPANIOLO, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

**JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS**

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

CHARLES FRIED

Solicitor General

JOHN R. BOLTON

Assistant Attorney General

THOMAS W. MERRILL

Deputy Solicitor General

LAWRENCE S. ROBBINS

Assistant to the Solicitor General

LEONARD SCHAITMAN

MARC RICHMAN

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

B. WAYNE VANCE

General Counsel

Department of Transportation

Washington, D.C. 20590

S. MARK LINDSEY

Chief Counsel

GREGORY B. MCBRIDE

Assistant Chief Counsel

DANIEL CAREY SMITH

Deputy Assistant Chief Counsel

Federal Railroad Administration

Washington, D.C. 20590

QUESTION PRESENTED

Whether regulations promulgated by the Federal Railroad Administration—mandating blood and urine tests of railroad employees who are involved in certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents, and rule violations—violate the Fourth Amendment on the ground that they do not require a showing of “particularized suspicion” of drug or alcohol impairment prior to the testing.

II

PARTIES TO THE PROCEEDINGS

The petitioners are James H. Burnley IV, Secretary of the Department of Transportation; and John H. Riley, Administrator of the Federal Railroad Administration. The respondents are the Railway Labor Executives' Association; the United Transportation Union General Committee of Adjustment, the Southern Pacific Company; the Brotherhood of Locomotive Engineers General Committee of Adjustment, the Southern Pacific Company; and the Brotherhood of Railroad Signalmen.

TABLE OF CONTENTS

	Page
Opinions below	i
Jurisdiction	1
Constitutional provision and regulations involved	2
Statement	2
Reasons for granting the petition	13
Conclusion	23
Appendix A	1a
Appendix B	50a
Appendix C	57a

TABLE OF AUTHORITIES

Cases:

<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	18
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982)	22
<i>Burka v. New York City Transit Auth.</i> , No. 85 Civ. 5751 (S.D.N.Y. Feb. 1, 1988)	20
<i>Division 241 Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976)	11, 17
<i>Flagg Bros. v. Brooks</i> , 436 U.S. 149 (1978)	22
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974)	22
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1987)	16, 17, 19
<i>McDonell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987)	11, 15, 16
<i>National Fed'n of Fed. Employees v. Carlucci</i> , No. 86-0681 (D.D.C. Mar. 1, 1988)	19, 20
<i>National Treasury Employees Union v. von Raab</i> , 816 F.2d 170 (5th Cir. 1987), cert. granted, No. 86-1879 (Feb. 29, 1988)	10, 13, 14, 15, 17, 18, 19, 22, 23
<i>New York v. Burger</i> , No. 86-80 (June 19, 1987)	12
<i>Rendell-Baker v. Kohn</i> , 457 U.S. 830 (1982)	22
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir. 1986), cert. denied, No. 86-576 (Dec. 1, 1986)	11, 16, 21
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	15

IV

Constitution, statutes and regulations:	Page
U.S. Const.:	
Amend. IV	2, 7, 8, 14, 15, 17, 18, 20, 21
Amend. V (Due Process Clause)	11
Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp.	
III) 421 <i>et seq.</i>	13
§ 202(a), 45 U.S.C. 431(a)	3, 21
Hours of Service Act, 45 U.S.C. 61-64b	6
49 C.F.R. Pt. 219:	
Subpt. A, Sections 219.1 to 219.21	5
Section 219.1(a)	2, 4, 13
Section 219.5(e)	6
Subpt. B, Sections 219.101, 219.103	5, 57a-58a
Subpt. C, Sections 219.201 to 219.213	2, 4, 5, 58a-68a
Section 219.201	58a
Section 219.201(a)(1)	5, 58a-59a
Section 219.201(a)(2)	5, 59a
Section 219.201(a)(3)	5, 59a
Section 219.203(a)	5, 60a, 61a
Section 219.203(b)(1)	5, 61a
Section 219.203(c)(1)	6, 61a
Section 219.205	6, 62a-63a
Section 219.211(a)(2)	6, 65a-66a
Section 219.213	6, 67a-68a
Subpt. D, Sections 219.301 to 219.309	2, 4, 6, 8, 9, 21, 22, 69a-78a
Section 219.301(b)(1)	6, 9, 69a
Section 219.301(b)(2)	6, 69a
Section 219.301(b)(3)	7, 69a-70a
Section 219.301(c)(2)	6, 9, 71a
Section 219.303	7, 72a-74a
Section 219.305	7, 75a
Section 219.309	7, 13, 76a-78a
Subpt. E, Sections 219.401 to 219.407	5
Subpt. F, Sections 219.501 to 219.505	5

V

Miscellaneous:	Page
48 Fed. Reg. (1983):	
p. 30723	3, 4
p. 30724	3
p. 30726	3, 4
49 Fed. Reg. (1984):	
pp. 24253-24254	4
pp. 24294-24295	19
50 Fed. Reg. (1985):	
p. 31514	2, 13
p. 31530	6
p. 31541	19
Letter from Solicitor General Fried to Joseph F. Spaniol, Jr. (Feb. 25, 1988)	13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

The Solicitor General, on behalf of James H. Burnley IV, Secretary of the Department of Transportation, and John H. Riley, Administrator of the Federal Railroad Administration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals declaring the regulations unconstitutional (App., *infra*, 1a-49a) is not yet reported. The opinion of the district court (App., *infra*, 50a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1988. A petition for a writ of certiorari is due on May 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Pertinent excerpts from the regulations involved in this case are reproduced in the appendix to the petition (App., *infra*, 57a-78a).

STATEMENT

Finding that "alcohol and drug use is sufficiently common to pose a significant safety problem" (50 Fed. Reg. 31514 (1985)), the Federal Railroad Administration (FRA) has promulgated detailed regulations intended "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" (49 C.F.R. 219.1(a)). Subpart C of those regulations generally requires railroads to conduct blood and urine testing of railroad employees who are directly involved in certain train accidents or fatal incidents. Subpart D of the regulations authorizes (but does not require) railroads to administer breath and urine tests after certain accidents, incidents, or rule violations.

By divided vote, the United States Court of Appeals for the Ninth Circuit held that Subparts C and D of the FRA regulations are unconstitutional under the Fourth Amendment, because they do not require a showing of "particularized suspicion" before a drug or alcohol test may be performed. Petitioners seek review of the court of appeals' unwarranted decision.

1. Section 202(a) of the Federal Railroad Safety Act of 1970, 45 U.S.C. 431(a), authorizes the Secretary of Transportation and, by delegation, the FRA, to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." On July 5, 1983, pursuant to that authority (see 48 Fed. Reg. 30723 (1983)), the FRA commenced a rulemaking process that culminated, two years later, in the promulgation of regulations governing the control of alcohol and drug abuse in railroad operations.

When it initiated that rulemaking effort in 1983, the FRA articulated the pressing safety issues that prompted its concern. "Alcohol impairment and drug impairment," the agency observed, "have been identified as causal or contributing factors in a number of train accidents and employee fatalities over the past ten years" (48 Fed. Reg. 30723 (1983)).¹ The FRA noted (*id.* at 30726) that "[d]uring the period from 1972 to date, the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor." "Those accidents," the FRA stated (*ibid.*),

¹ For example, the agency cited a 1979 statistical study of alcohol abuse by employees on seven railroads that employed almost half of the nation's railroad workers. That study showed that "19% of all employees were 'problem drinkers'"; "23% of operating personnel were 'problem drinkers'"; "[o]nly 4% of problem drinkers were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures"; "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year (1978)"; "13% of workers reported to work at least 'a little drunk' one or more times during that period"; "13% of operating employees drank while on duty at least once during the study year, averaging about 3 such instances during the year"; and "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year." 48 Fed. Reg. 30724 (1983).

"resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars)." The FRA also identified (*ibid.*) "an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor."² The agency noted (*id.* at 30723) that it had historically "worked in concert with rail labor and management leaders to improve carrier rules programs and employee assistance programs," but it found that "past FRA efforts to promote voluntary action by the railroad industry to address this problem ha[d] not met with uniform success."

On August 2, 1985, after reviewing extensive comments from representatives of the railroad industry, labor groups, and the general public, the FRA promulgated the regulations that are at issue in this lawsuit.³ The regulations consist of six subparts and are generally intended "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" (49 C.F.R. 219.1(a)). Subparts C and D of the regulations

² The FRA noted, moreover (48 Fed. Reg. 30726 (1983)), that the available figures significantly understated the extent of the problem, since the threat of being held liable in tort and the risk of losing one's job discouraged the railroads and employees from accurately reporting the cause of accidents.

³ Comments received by the agency during the rulemaking process "confirmed that alcohol and drug use does occur on the railroads with unacceptable frequency, despite existing rules and programs. Available information from all sources, including FRA safety investigations, suggests that the problem includes 'pockets' of drinking and drug use involving multiple crew members (before and during work), sporadic cases of individual employees reporting to work impaired, and repeated drinking and drug use by individual employees who are chemically or psychologically dependent on those substances." 49 Fed. Reg. 24253-24254 (1984).

(App., *infra*, 58a-78a), in particular, establish procedures for testing railroad employees for drug and alcohol impairment whenever they have been directly involved in certain train accidents, incidents, or serious safety rule violations.⁴

Subpart C (49 C.F.R. 219.201 to 219.213), entitled "Post-Accident Toxicological Testing," provides (49 C.F.R. 219.203(a)) that railroads "shall take all practicable steps to assure that all covered employees of the railroad directly involved * * * provide blood and urine samples for toxicological testing by FRA" after any one or more of the following circumstances: a "major train accident"—defined as one which includes either a fatality, the release of hazardous material accompanied by an evacuation or reportable injury, or damage to railroad property of \$500,000 or more (49 C.F.R. 219.201(a)(1)); an "impact accident" (collision) that results in a reportable injury or damage to railroad property of \$50,000 or more (49 C.F.R. 219.201(a)(2)); or a "train incident that involves a fatality to any on-duty railroad employee" (49 C.F.R. 219.201(a)(3)). Railroads are required to "make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident" (49 C.F.R. 219.203(b)(1)). Toward that end, employees must "be transported to an independent medical facility where the samples shall be obtained" by qualified medical personnel

⁴ In addition to the testing procedures, Subpart A sets out some general provisions (49 C.F.R. 219.1 to 219.21), Subpart B states a general prohibition of alcohol and drug use (49 C.F.R. 219.101, 219.103), Subpart E establishes policies for identifying alcohol and drug abusers and referring them for treatment (49 C.F.R. 219.401 to 219.407), and Subpart F creates a system for pre-employment screening (49 C.F.R. 219.501 to 219.505). Respondents did not challenge those additional subparts of the regulations in the present lawsuit.

(49 C.F.R. 219.203(c)(1)). The regulations also establish procedures for collecting and handling the samples (49 C.F.R. 219.205). In addition, the FRA is required to notify employees of the results of the tests and to afford them an opportunity to respond in writing prior to the preparation of any final investigative report (49 C.F.R. 219.211(a)(2)). Employees who refuse to provide required blood or urine samples may not perform covered service for a period of nine months, but they are entitled to a hearing concerning their refusal to take the test (49 C.F.R. 219.213)).⁵

Subpart D of the regulations (49 C.F.R. 219.301 to 219.309), entitled "Authorization to Test for Cause," authorizes (but does not require) railroads to mandate breath or urine tests (but not blood tests) for covered employees under the following circumstances: in the event that two supervisors, including at least one who has received special training in detecting drug intoxication, have a "reasonable suspicion" that an employee is under the influence or is impaired by alcohol or drugs, based upon specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee (49 C.F.R. 219.301(c)(2));⁶ in the event of a reportable accident or incident, where a supervisor has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident (49 C.F.R. 219.301(b)(2)); or in the event of cer-

⁵ As defined by 49 C.F.R. 219.5(e), "covered service" generally refers to all service for a railroad that is subject to the Hours of Service Act, 45 U.S.C. 61-64b, and essentially includes all "train and engine crews, yard crews (including switchmen), hostlers, train order and block operators, dispatchers, and signalmen" (50 Fed. Reg. 31530 (1985)).

⁶ In order to administer a breath test, the determination of only one supervisory employee is required. 49 C.F.R. 219.301(b)(1).

tain specific rule violations, including non-compliance with a signal, excessive speeding, improper switch alignment, failure to stop short of a derail, and failure to secure a hand brake (49 C.F.R. 219.301(b)(3)). The regulations establish procedures and safeguards for conducting breath and urine tests, including a provision that assures that whenever the results of the tests are intended for use in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility (49 C.F.R. 219.303, 219.305). Finally, where the employee has declined the opportunity to provide a blood sample, the regulations permit railroads to presume impairment from the presence of an identified controlled substance in the urine (in the absence of persuasive evidence to the contrary), but they require the railroads to provide detailed notice to employees of that presumption and to advise employees of their right to provide a contemporaneous blood sample (49 C.F.R. 219.309).

2. Respondents, the Railway Labor Executives' Association and various of its member labor organizations, brought this action seeking to enjoin the FRA regulations on a variety of statutory and constitutional grounds. In an opinion issued from the bench (App., *infra*, 50a-56a), the district court granted summary judgment in petitioners' favor. The court explained (*id.* at 52a-53a) that under the Fourth Amendment railroad personnel "have a valid interest in the integrity of their own bodies," but that there is also a competing "public and governmental interest in the * * * promotion of * * * railway safety, safety for employees, and safety for the general public that is involved with the transportation." In striking the appropriate balance, the court emphasized (*id.* at 53a) "that the railroad industry is one of the most extensively regulated

industries that we have in interstate commerce; and that the regulation[s] extend[] not just to the railroads themselves, but a certain amount of regulation of the employees." Applying the criteria for assessing the reasonableness of a search within a "pervasively regulated" industry (*ibid.*), the court noted (*id.* at 53a-55a) that the FRA regulations served "a valid governmental and public interest"; that there were "objective event[s] which trigger[] the testing" which were "as well defined as a set of regulations could give"; and that the regulations made a "genuine attempt * * * to limit the scope of the testing requirements to the needs and the events as they have occurred." The court accordingly held that the Fourth Amendment balance "is being struck in favor of the regulatory scheme" (*id.* at 53a).⁷

3. A divided court of appeals reversed (App., *infra*, 1a-49a). The court held, first (*id.* at 8a-13a), that drug and alcohol tests are searches within the meaning of the Fourth Amendment, and that Subpart D of the regulations involves sufficient governmental action to implicate the Fourth Amendment, even though that subpart only authorizes, but does not require, the adoption of testing procedures by otherwise private railroads. The court therefore turned to whether the regulations were constitutionally reasonable. It "agree[d] that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant" (*id.* at 16a). It also acknowledged (*id.* at 24a) that "accommodation of railroad employees' privacy interest with the significant safety concerns of the govern-

⁷ The district court rejected (App., *infra*, 51a-52a) as meritless respondents' other constitutional and statutory challenges to the regulations.

ment does not require adherence to a probable cause standard." The court held, however (*id.* at 25a), that "particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception" and, because the regulations were wanting in that respect, the court struck them down.⁸

Elaborating on its understanding of the "particularized suspicion" standard, the court of appeals emphasized (App., *infra*, 25a-26a) that "[a]ccidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." The court also surmised (*id.* at 26a) that it would "pose[] no insuperable burden on the government to require individualized suspicion," noting (*ibid.*) that such a standard was already codified in certain Subpart D provisions (see 49 C.F.R. 219.301(b)(1) and (c)(2)), and reasoning (App., *infra*, at 26a-27a) that the same standard "should be incorporated into the mandatory testing provisions set out in 49 C.F.R. § 219.201 and the other authorized testing provisions set out in 49 C.F.R. § 219.301(b)(2) and (3)." In addition, the court explained (*id.* at 28a) that in the absence of a requirement of

⁸ In insisting on a requirement of particularized suspicion, the court of appeals rejected (App., *infra*, 16a-17a) the district court's finding "that th[e] regulations should be evaluated under the standards applicable to administrative inspections of pervasively regulated industries." The court explained (*id.* at 18a) that "[a]ll of the decisions in this line of cases have upheld warrantless searches of property, not of persons," and it "decline[d] to make such an extension in this case." It also stated (*id.* at 19a) that "[a]lthough some railroad safety regulations are directed at employees, * * * the vast bulk of safety legislation is directed at owners and managers of railroads, not their employees."

particularized suspicion, it would be troubled by a further "flaw in the reasonableness of this approach to the problem"—the inability of the drug tests to "measure current drug intoxication or degree of impairment," rather than merely "the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug" (*ibid.*). Reversing the judgment of the district court, the court of appeals held that "intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment" (*id.* at 36a).⁹

In striking down the FRA regulations for want of a "particularized suspicion" requirement, the court of appeals recognized (App., *infra*, 30a) that its decision "may be seen as conflicting with decisions of other circuits." Indeed, the court expressly rejected the Fifth Circuit's decision in *National Treasury Employees Union v. von Raab*, 816 F.2d 170 (1987)—in which this Court recently granted certiorari (No. 86-1879 (Feb. 29, 1988))—on the ground that the Fifth Circuit had focused on factors that the court of appeals did not find "relevant" and had failed to "consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception" (App., *infra*, 31a). The court likewise dismissed (*ibid.*) as not "particularly persuasive" the

⁹ The court agreed, however (App., *infra*, 29a), that "[t]he manner of conducting the tests is generally reasonable in that they are performed in medical facilities. 49 C.F.R. § 219.203(c)." And the court acknowledged (*ibid.*) that "[t]he intrusiveness of the process of urine testing has been reduced as much as is practicable in that only personnel of the medical facility may supervise the sample collection. 49 C.F.R. § 219.305(a)."

Seventh Circuit's decision in *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, cert. denied, 429 U.S. 1029 (1976), even though, as the court acknowledged (App., *infra*, 31a), "the case, because it involves bus drivers, is factually similar."¹⁰ The court of appeals also found (*ibid.*) the decision of the Eighth Circuit in *McDonnell v. Hunter*, 809 F.2d 1302 (1987), unhelpful, explaining that the court in that case had applied the wrong legal standard and that it had erroneously assumed that urinalysis is less intrusive than body cavity searches. And the court distinguished (App., *infra*, 31a) the decision of the Third Circuit in *Shoemaker v. Handel*, 795 F.2d 1136 (1986), cert. denied, No. 86-576 (Dec. 1, 1986), because that case had "adopted the pervasively regulated industry rationale to uphold testing of jockeys," and the court of appeals "d[id] not consider that rationale applicable to the employees in [this] case."¹¹

Judge Alarcon dissented (App., *infra*, 37a-49a). In his view, "the activities of railway personnel are closely regulated to promote safety," and he would therefore have "adopt[ed] the well-reasoned opinion [of the Third Circuit] in *Shoemaker*" and would have held "that the closely regulated industry exception to the requirement of a warrant and probable cause applies to blood, breath, and urine tests of railway employees under the specific circumstances prescribed in the regulations challenged in this

¹⁰ The court of appeals stated (App., *infra*, 32a) that the *Suscy* decision lacked a "very thorough analysis" and that it did not apply the proper test of reasonableness.

¹¹ The court of appeals rejected respondents' other challenges to the FRA regulations predicated on statutory grounds (App., *infra*, 32a-34a), the right to privacy (*id.* at 34a-35a), and the equal protection component of the Due Process Clause (*id.* at 35a-36a).

action" (*id.* at 39a (emphasis in original)).¹² Moreover, Judge Alarcon would have found the FRA regulations constitutionally acceptable, even apart from the regulated nature of the industry. Noting that the court's holding was in conflict with decisions in several other circuits (*id.* at 42a), Judge Alarcon criticized the majority for "fail[ing] to engage in [a] balancing of interests" and for focusing instead "solely on the degree of impairment of the workers' privacy interests" (*id.* at 46a). A proper balance, the dissent observed (*ibid.*), would have recognized "that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests."¹³

¹² Judge Alarcon reasoned (App., *infra*, 40a) that the "three-pronged test" articulated in *New York v. Burger*, No. 86-80 (June 19, 1987), was satisfied by the FRA regulations: "[t]he government has a 'substantial' interest in requiring that tests be conducted to assure that railroad employees avoid drug or alcohol use which might affect their ability to perform their jobs safely" (App., *infra*, 40a); "warrantless inspections are 'necessary to further [the] regulatory scheme'" (*id.* at 41a (citations omitted)); and "the testing procedures set out in the regulatory scheme 'provid[e] . . . constitutionally adequate substitute[s] for a warrant'" (*ibid.* (citations omitted)). Judge Alarcon also stated (*ibid.*) that the "'time, place, and scope'" of the inspections are "brought within reasonable bounds" by the regulations: the tests must take place "'as soon as possible' after the occurrence of an event specified in section 219.201" (*ibid.*); the tests "must be conducted by qualified independent medical personnel at independent medical facilities" (*id.* at 42a); and the "regulations * * * limit the scope of testing to determining whether drugs or alcohol are present in the subject's blood or urine" (*ibid.*).

¹³ Judge Alarcon also addressed the majority's qualms about the inability of drug tests to discern present impairment. He noted that the FRA regulations require railroads to advise employees about the limitations of the urine tests and to counsel them to take a contem-

At petitioners' request, the Ninth Circuit has stayed its mandate pending the disposition of this petition.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case struck down a carefully considered regulatory scheme designed "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" (49 C.F.R. 219.1(a)). The FRA, acting pursuant to its delegated authority under the Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III) 421 *et seq.*, conducted a two-year rulemaking effort, entertained extensive comments from industry, labor, and the general public, and promulgated a detailed set of regulations addressing what it found to be a "deep and widespread" problem that "require[d] some kind of new initiative" (50 Fed. Reg. 31514 (1985)). The court of appeals found this effort wanting, however, solely because the FRA regulations do not in every case require a showing of "particularized suspicion" prior to testing. For three reasons, that decision warrants further review by this Court.

First, as the court of appeals acknowledged (App., *infra*, 30a), the decision in this case conflicts sharply with decisions in other circuits. Indeed, this Court recently granted certiorari in one such case, *National Treasury Employees Union v. von Raab*, No. 86-1879 (Feb. 29, 1988), following a supplemental filing in which petitioners there urged, and we agreed (see Letter from Solicitor General Fried to Joseph F. Spaniol, Jr. (Feb. 25, 1988)),

poraneous blood test if they have ingested drugs anytime within the previous sixty days (*id.* at 47a, citing 49 C.F.R. 219.309). That warning, Judge Alarcon observed (App., *infra*, 48a), "protects employees from any mistake that might result from the 'sensitivity' of the urine testing procedure."

that a conflict with the Ninth Circuit's decision in the present case justified further review.¹⁴

Second, although this case and the *von Raab* case present the same ultimate legal question — whether the Fourth Amendment requires a showing of particularized suspicion before the government may engage in employee alcohol and drug testing — this case has several important features that are not presented by *von Raab*. The nature of the governmental interest in the two cases is quite different. Unlike the testing program for Customs employees in *von Raab* — the principal purpose of which is to safeguard the integrity of Customs operations — the tests involved in the present case are principally intended to protect the public safety. In addition, the two cases involve very different types of testing programs. Whereas the tests in *von Raab* were given to all applicants for certain job classifications, the testing in this case applies only to particular individuals involved in certain serious accidents or safety violations. Indeed, the issues presented by this case neatly complement those presented by *von Raab*. By granting review in both cases, the Court will be able to consider the requirements of the Fourth Amendment against a wider and more representative backdrop of competing interests, and therefore provide better guidance to the lower courts and the government in this important and sensitive area.

Finally, the Ninth Circuit's decision is wrong. This Court's cases make clear that a showing of "particularized need" is not an irreducible minimum of reasonableness under the Fourth Amendment. More generally, the court of appeals overstated the nature of employees' privacy in-

¹⁴ We have furnished respondents with copies of petitioners' supplemental brief in the *von Raab* case and the Solicitor General's February 25 letter to Mr. Spaniol.

terests, and understated the competing public interests served by a program that promotes the sober operation of the nation's railroads.

1. The court of appeals held (App., *infra*, 24a) that "[f]inding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought." In so holding, the court was "mindful that [its] decision may be seen as conflicting with decisions of other circuits" (*id.* at 30a). In that limited respect, the court was clearly correct.

For example, in its decision in *von Raab*, the Fifth Circuit expressly rejected the claim that the Fourth Amendment requires individualized suspicion before the Customs Service may administer drug tests to employees who wish to transfer to certain sensitive positions within the Service. The court of appeals observed (816 F.2d at 176, quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976)) that "[w]hile 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.'" Balancing the competing interests, the Fifth Circuit upheld the Customs drug testing program as reasonable under the Fourth Amendment, even though, like the FRA regulations, it did not impose a requirement of individualized suspicion.¹⁵

The Eighth Circuit reached the identical conclusion in *McDonnell v. Hunter*, 809 F.2d 1302 (1987), a case involving drug testing of employees at correctional institutions.

¹⁵ The Ninth Circuit rejected the analysis in *von Raab*, stating that the Fifth Circuit had relied on factors that were not "relevant" and that it had failed to "consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception" (App., *infra*, 31a).

Finding the interest in prison security to be "central" and urinalysis "not nearly so intrusive as body searches," the court of appeals held that the drug tests may be performed—without individualized suspicion—either "uniformly or by systematic random selection" (809 F.2d at 1308).¹⁶

The Third Circuit has also held that drug tests may be administered without individualized suspicion. In *Shoemaker v. Handel*, 795 F.2d 1136 (1986), cert. denied, No. 86-576 (Dec. 1, 1986), the court upheld regulations promulgated by the New Jersey Racing Commission that permit drug and alcohol testing for racing officials, jockeys, trainers, and grooms. The court held (795 F.2d at 1141-1143) that the horse-racing industry in general, and jockeys in particular, have been made subject to pervasive regulation. The court accordingly rejected the jockeys' claim (*id.* at 1141) that daily breathalyzer tests and random urine tests may be required only where there is individualized suspicion of drug or alcohol abuse.¹⁷

The recent decision of the District of Columbia Circuit in *Jones v. McKenzie*, 833 F.2d 335 (1987), is also in conflict with the decision below. There, the court of appeals held that the District of Columbia could constitutionally administer drug tests to bus attendants who were responsible for supervising, attending and carrying handicapped children. The court agreed that there were "strong privacy interests" involved (833 F.2d at 339), but concluded that

¹⁶ The court of appeals in the present case stated (App., *infra*, 31a) that the Eighth Circuit in *McDonnell* applied the wrong legal standard and that it erred in characterizing urinalysis as less intrusive than a body cavity search.

¹⁷ The Ninth Circuit disagreed, in part because it "decline[d]" to "exten[d]" the "administrative inspection exception" to searches of persons, as opposed to searches of property (App., *infra*, 18a).

those were outweighed by the "serious safety concerns on the other side of the balance" (*id.* at 340 (emphasis in original)). It therefore reversed the decision of the district court, which had held that the District could not conduct drug testing in the absence of "particularized probable cause" (*id.* at 338).¹⁸

Finally, in *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, cert. denied, 429 U.S. 1029 (1976)—a case which the Ninth Circuit recognized as "factually similar" to the present case (App., *infra*, 31a)—the Seventh Circuit approved a drug and alcohol testing program for bus drivers who were involved in serious accidents. There, as here, the tests did not require individualized suspicion of drug or alcohol abuse. The court of appeals nevertheless upheld the program as reasonable under the Fourth Amendment.¹⁹

2. Further review in this case is also warranted in order to provide effective guidance to lower courts and the government in an area of the utmost public importance. Although the Court has recently granted certiorari in the Fifth Circuit's *von Raab* decision (No. 86-1879 (Feb. 29, 1988)), the present case offers a very different perspective on drug and alcohol testing. Unlike the drug tests in *von Raab*, which are primarily justified by a concern for

¹⁸ Like the Ninth Circuit, however (see App., *infra*, 28a-29a), the D.C. Circuit observed that the urinalysis technology involved in that case was unable to test for present drug impairment. For that reason, the D.C. Circuit concluded "that the School System could not constitutionally test its employees for drugs in the manner *Jones* was tested" (833 F.2d at 339 (emphasis in original)).

¹⁹ The Ninth Circuit found the *Suscy* case not to be "particularly persuasive," in that the Seventh Circuit proceeded "without very thorough analysis" and failed to apply the appropriate legal standard (App., *infra*, 31a-32a).

employee and operational integrity, the testing of railroad employees is based on the need to secure the safe performance of an important public service. And whereas the tests in *von Raab* are administered uniformly to all employees who apply for certain covered positions, the tests in this case are targeted to employees who have been directly involved in significant accidents, incidents, or rule violations.

These and other distinctions will entail fundamental differences in the balancing process required to determine whether the programs are "reasonable" within the meaning of the Fourth Amendment. This Court has made it clear that in determining reasonableness, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In some respects, the tests in *von Raab* may be more intrusive (because they apply to all employees who apply for certain positions); in other respects they may be less intrusive (because they are only administered when an employee seeks a covered position). In some respects, the government's justifications for performing the tests in this case may be more compelling (because of demonstrated safety problems); in other respects they may be less compelling (because of the difficulty of demonstrating current impairment through urinalysis testing).²⁰ Indeed, because of these and other

²⁰ We note, however, that the court of appeals erred in concluding (App., *infra*, 28a) that urine tests, when supplemented by blood tests, are not "reasonably related" to the purposes of drug testing, on the grounds that, standing alone, those tests cannot measure current drug impairment. Even granting the latter premise—which, in any event, is not always true—the FRA does not act "unreasonably" in gathering blood and urine samples simply because it must examine those samples along with other relevant data in making the ultimate deter-

differences, and because of the approach taken by the court of appeals below, there is no reason to expect that the Ninth Circuit would reach a different result on remand, regardless of how this Court decides *von Raab*. In our judgment, therefore, the Court should grant plenary review in both cases, rather than hold the present case pending the disposition of *von Raab*.

In addition, by granting review in the instant case, along with *von Raab*, the Court will be able to consider a wider range of issues than will be presented if it considers *von Raab* alone. For example, several courts, including the Ninth Circuit in the decision below (App., *infra*, 28a-29a), have expressed concern that current state-of-the-art urinalysis tests cannot distinguish between persons who are intoxicated or impaired and persons who have used illicit drugs in the recent past but who may not be currently impaired. See also *Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987); *National Fed'n of Fed. Employees v. Carlucci*, No. 86-0681 (D.D.C. Mar. 1, 1988). This concern has been advanced primarily in cases in which the government's interest is in protecting public safety, on the theory—the validity of which we do not concede—that the only relevant consideration in such a case is whether employees are currently impaired. Such a concern, however, is of little or no relevance in a case like *von Raab*, where the primary governmental interest relates to the

mination of current impairment. What is more, detection of current impairment is not the only function of the FRA drug and alcohol testing program. The program is also designed to deter the use of illicit drugs (50 Fed. Reg. 31541 (1985)), to identify persons with chemical dependencies who require treatment (49 Fed. Reg. 24294-24295 (1984)), and to determine with greater precision the causes of major accidents in order to target enforcement and regulatory efforts (50 Fed. Reg. 31541 (1985)).

danger that those who *use* illicit drugs, whether or not they are impaired on the job, may be susceptible to corruption or blackmail.

Moreover, there are at present a growing number of cases in the lower federal courts and state courts in which safety concerns—rather than the interest in public integrity—have been advanced as the primary basis for drug or alcohol testing. The courts have reached disparate results in those cases. Compare, *e.g.*, *National Fed'n of Fed. Employees v. Carlucci*, *supra* (safety interests do not justify random urinalysis of civilian employees in Department of Defense, in such positions as air traffic controller, pilot, and aircraft mechanic), with *Burka v. New York City Transit Auth.*, No. 85 Civ. 5751 (S.D.N.Y. Feb. 1, 1988), slip op. 38-39 (approving safety reasons as legitimate basis for drug testing of mass transit workers). Review in the present case would therefore offer important direction to lower courts and the government about the distinct Fourth Amendment issues presented by drug testing programs designed to protect public safety.

3. Finally, review is warranted in this case because the decision of the court of appeals is wrong. The court erred when it took as its premise (App., *infra*, 24a) the proposition that “[f]inding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought.” As Judge Alarcon observed in dissent (*id.* at 46a), the court of appeals accepted that premise only because it “focuse[d] solely on the degree of impairment of the workers’ privacy interests” and never “engage[d] in the balancing of interests required by the Court.” The court also erred by failing to consider the regulated nature of railroad work when it assessed the strength of the employees’ expectation of privacy. That error puts the

court squarely at odds with the decision of the Third Circuit in the *Shoemaker* case (795 F.2d 1136 (1986)), and, as the dissenting judge noted (App., *infra*, 38a-39a), hinges on a mistaken impression of the extent to which railroad employees are in fact subject to government regulation.²¹

What is more, the court of appeals never came to grips with the most basic feature of the testing program in this case: that it is triggered only by a significant train accident, incident, or rule violation. The court ignored that element of the program entirely, simply because, in its view, an employee’s direct involvement in such an event does not amount, without more, to particularized suspicion of alcohol or drug use (App., *infra*, 25a-26a). But in so doing, the court overlooked the fact that the regulations are designed to assist the FRA and railroads in ascertaining the causes of serious accidents, incidents, and rule violations. That is an important public and governmental interest, and it provides a compelling justification for the decision to administer the tests in the first place. Thus, while the narrowly targeted nature of the testing may not, standing alone, satisfy a “particularized suspicion” standard, it surely bears in an important way on the overall reasonableness of the regulations.²²

²¹ For example, the court of appeals stated that “[t]he Secretary of Transportation is expressly precluded from setting standards for qualifications of railroad employees” (App., *infra*, 21a); but the very statute on which the court relied in drawing that conclusion (45 U.S.C. 431(a)) expressly authorizes the Secretary to issue such rules and regulations “as are specifically related to safety.”

²² The court’s determination (App., *infra*, at 10a-13a) that the Subpart D regulations implicate the Fourth Amendment—even though they merely authorize, but do not require, testing by private railroads—is likewise doubtful at best. The “exercise of the choice allowed by . . . law[,] where the initiative comes from [a private party] and not from the State, does not make its action in doing so ‘state action’ . . .” *Jackson v. Metropolitan Edison Co.*, 419 U.S.

The court of appeals' decision has effectively nullified a carefully considered effort to detect and deter drug and alcohol impairment in the operation of the nation's rails. The decision is flawed at every turn, and it is in stark conflict with decisions in other circuits. And because of the special features of the testing programs at issue, we believe that a grant of plenary review in this case, in conjunction with *von Raab*, would provide this Court with a more representative overview of the range of issues involved in drug and alcohol testing, and would afford important guidance to the lower courts and the government in an area of mounting public concern.

345, 357 (1974). See also *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n.10, 164-166 (1978); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841-842 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Rather, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State" (457 U.S. at 1004). The court of appeals adduced no such "coercive power" or "significant encouragement" in its analysis of the Subpart D regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.²³
Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHATMAN
MARC RICHMAN
Attorneys

B. WAYNE VANCE
General Counsel
Department of Transportation

S. MARK LINDSEY
Chief Counsel

GREGORY B. MCBRIDE
Assistant Chief Counsel

DANIEL CAREY SMITH
Deputy Assistant Chief Counsel
Federal Railroad Administration

MARCH 1988

²³ If the petition is granted, the Court may wish to direct that the case be set for argument in tandem with *National Treasury Employees Union v. von Raab*, No. 86-1879.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2891

D.C. No. CV85-7958CAL

RAILWAY LABOR EXECUTIVES' ASSOCIATION; UNITED
TRANSPORTATION UNION GENERAL COMMITTEE OF
ADJUSTMENT, THE SOUTHERN PACIFIC COMPANY;
BROTHERHOOD OF LOCOMOTIVE ENGINEERS GENERAL
COMMITTEE OF ADJUSTMENT, THE SOUTHERN PACIFIC
COMPANY; AND BROTHERHOOD OF RAILROAD SIGNALMEN,
PLAINTIFFS-APPELLANTS

VS.

JAMES H. BURNLEY*, SECRETARY, DEPARTMENT OF
TRANSPORTATION; JOHN R. RILEY, ADMINISTRATOR,
FEDERAL RAILROAD ADMINISTRATION,
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES A. LEGGE, District Judge, Presiding

Argued and Submitted
July 8, 1986 – Seattle, Washington

[Filed: FEB. 11, 1988]

* James H. Burnley is substituted for defendant Elizabeth Dole pursuant to Fed. R. App. P. 43(c)(1).

OPINION

Before: TANG, PREGERSON and ALARCON,
Circuit Judges.

TANG, Circuit Judge:

The Railway Labor Executives' Association¹ and various railway labor organizations which are constituent members (collectively "RLEA") appeal the district court's grant of summary judgment for the government. RLEA challenges the constitutionality of Federal Railroad Administration (FRA) regulations mandating blood and urine tests of employees after certain train accidents and fatal incidents, and authorizing breath and urine tests after certain accidents, incidents and rule violations. RLEA also argues that the regulations violate provision of the Railway Labor Act, the Federal Rehabilitation Act and the Federal Railroad Safety Act. We reverse.

BACKGROUND

The regulations at issue are codified in 49 C.F.R. Part 219 (1986). They were issued by the FRA after a two-year rulemaking process on August 2, 1985 and scheduled to become effective November 1, 1985. RLEA was a party to the administrative proceedings and filed a petition for reconsideration which the Secretary denied on October 28, 1985. It then filed suit in federal district court on October 31, 1985, and received a temporary restraining order prohibiting implementation of the regulations. The TRO remained in effect until the district court granted summary

¹ The RLEA is an unincorporated association representing all crafts of railroad workers in the country.

judgment for the government on December 9, 1985. RLEA sought and obtained a stay pending appeal from this Court on January 3, 1986 but the Supreme Court vacated the stay on January 27, 1986. *Dole v. RLEA*, 106 S. Ct. 876 (1986). The regulations thus went into effect February 10, 1986 with mandatory post-accident testing beginning March 10.

The portions of the new regulation which are the subject of this challenge are Subpart C, which requires post-accident testing, and Subpart D, which authorizes testing for "cause." The key provisions are summarized below, and set out in full in the margin.

The provisions of Subpart C mandate alcohol and drug testing for all covered employees involved in various events, including: major train accidents (involving a fatality, release of hazardous material with either evacuation or injury, or \$500,000 damage to railroad property); impact accidents (involving a reportable injury² or damage to railroad property of \$50,000); and fatal incidents (involving fatality of an on-duty railroad employee). 49 C.F.R. § 219.201.³ The regulations require that blood and urine

² A reportable injury is one which must be reported under Part 225. 49 C.F.R. § 219.5(s). According to 49 C.F.R. § 225.19(d)(4), a reportable injury is one that requires medical treatment or results in restriction of work or motion for one or more work days, one or more lost work days, termination of employment, transfer to another job or loss of consciousness.

³ § 219.201 Events for which testing is required.

(a) *List of events.* On and after March 10, 1986, except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraph (a) (1) through (3) of this section:

(1) *Major train accident.* Any train accident that involves one or more of the following:

(i) A fatality;

samples be taken from all crew members of a train involved in such an accident or incident as soon as possible afterwards. Blood samples are to be taken at independent medical facilities by qualified medical professionals or technicians. 49 C.F.R. § 219.203.⁴ Refusal to provide a sample results in a 9 month period of disqualification. 49 C.F.R. § 219.213.⁵

- (ii) Release of a hazardous material accompanied by –
 - (A) An evacuation; or
 - (B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or
- (iii) Damage to railroad property of \$500,000 or more.
- (2) *Impact accident.* An impact accident resulting in –
 - (i) A reportable injury; or
 - (ii) Damage to railroad property of \$50,000 or more.
- (3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

⁴ § 219.203 **Responsibilities of railroads and employees.**

(a) *Employees tested.* (1) Following each accident and incident described in § 219.201, the railroad (or railroads) shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological testing by FRA.

(b) *Timely sample collection.* (1) The railroad shall make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident.

(c) *Place of sample collection.* (1) Employees shall be transported to an independent medical facility where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

⁵ § 219.213 **Unlawful refusals; consequences.**

(a) *Disqualification.* (1) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months.

The provisions of Subpart D authorize railroads to require covered employees to submit to breath or urine tests when a supervisor has a reasonable suspicion that an employee is under the influence or impaired by alcohol or drugs. To require a urine test, two supervisors must have reasonable suspicion, and if drug use is suspected, one of them must have been trained in spotting drug use. 49 C.F.R. § 219.301(b)(1),⁶ (c)(2)⁷. The railroads may also

⁶ § 219.301 **Testing for reasonable cause.**

(b) *Reasonable cause for breath tests.* The following circumstances constitute reasonable cause for the administration of breath tests under this section:

(1) *Reasonable suspicion.* A supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol, or alcohol in combination with a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee.

⁷ (c) *Reasonable cause for urine test –*

* * *

(2) *Reasonable suspicion.* Reasonable cause also exists where a supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee, subject to the following limitations:

(i) An employee may be required to submit to urine testing for reasonable suspicion only if the determination is made by at least two supervisory employees; and

(ii) If the determination to require urine testing is based upon suspicion that the employee is under the influence of or impaired by a controlled substance, at least one supervisory employee responsible for the decision to require urine testing must have received at least three (3) hours of training in the signs of drug intoxication consistent with a program of instruction on file with FRA under Part 217 of this title. Such program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of the major

require testing when an employee is involved in an accident or incident which must be reported under Part 225 and a supervisor has reasonable suspicion that his acts or omissions contributed to the accident. 49 C.F.R. § 219.301(b)(2).⁸ The railroads may also require testing when an employee violates a railroad operating rule listed in 49 C.F.R. § 219.301(b)(3).⁹

drug groups on the controlled substances list (narcotics, depressants, stimulants, hallucinogens, and marijuana).

*** § 219.301 Testing for reasonable cause**

(b) *Reasonable cause for breath tests.*

(1) *Reasonable suspicion* (see note 5)

* * *

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under Part 225 of this title, and a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

⁹ (3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors:

(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other director [*sic*] with respect to movement of a train that involves —

(A) Occupancy of a block or other segment of track to which entry was not authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consist with § 218.37 of this title;

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule or operation of a switch under a train;

There are no factual disputes in this case except as to the extent of alcohol and drug abuse in the railroad industry and the number of accidents involving either. The record shows that, between 1975 and 1984, of 791 fatalities caused by railroad employees, 37 resulted from accidents or incidents involving alcohol or drug use, or 4.7 percent. The FRA contends the problem is more serious than the 4.7 percent figure would indicate because of underreporting by the railroad industry of alcohol and drug involvement, because of the increased dangers involved in railroad transport of hazardous materials, and because drug and alcohol use has grown more pervasive in recent years.

The district court assumed the seriousness of the problem, and the RLEA concedes that alcohol and drug use are serious hazards to railroad safety. Thus, although there is some difference of opinion about just how pervasive the problem is, the central dispute in this case is not a factual one. Rather, the case involves disputes as to the statutory authority for the rule and its constitutionality.

ANALYSIS

We review a grant of summary judgment de novo. *Darrington v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes; or

(vii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). We review questions of law de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

I. FOURTH AMENDMENT

To decide whether the drug tests mandated or authorized by the regulations violate the fourth amendment, we must first determine whether the amendment's prohibition of unreasonable searches and seizures applies to drug tests conducted at the instigation of the railroads pursuant to regulations adopted by the FRA. We hold that it does, both because the tests in question constitute searches within the meaning of the fourth amendment and because the federal government's role in promulgating the regulations in question is sufficient government action to subject the tests to the limitations of the fourth amendment.

A. Drug and Alcohol Tests are Searches

The fourth amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." These rights are implicated only if the conduct at issue infringes "an expectation of privacy that society is prepared to consider reasonable." *O'Connor v. Ortega*, 107 S.Ct. 1492, 1497 (1987) (plurality opinion) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The question we must first consider is whether a railroad employee has a reasonable expectation of privacy in the personal information contained in his body fluids.

It has long been clearly settled that blood tests such as those mandated by 49 C.F.R. § 219.203 are searches within the meaning of the fourth amendment. *Schmerber*

v. California, 384 U.S. 757, 767 (1966).

Every court that has considered the matter has similarly concluded that urine tests, such as those mandated by 49 C.F.R. § 219.203 and authorized by 49 C.F.R. § 219.301, are searches for fourth amendment purposes. See, e.g., *Everett v. Napper*, 833 F.2d 1507, 1509 (11th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266-67 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 586 (N.D. Ohio 1987); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1057, 1513 (D.N.J. 1986); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984); *Smith v. City of East Point*, 183 Ga. App. 659, 359 S.E.2d 692 (1987). The usual rationale is that urine testing is similar to blood testing because even though urine is routinely discharged from the body it is "normally discharged and disposed of under circumstances that merit protection from arbitrary interference." *Capua*, 643 F. Supp. at 1513. Because people have reasonable expectations of privacy in the personal information body fluids contain, the governmental taking of a urine specimen constitutes a search and seizure within the meaning of the fourth amendment. *Id.*

It has also been held, with less discussion of the rationale, that breath tests are searches within the mean-

ing of the fourth amendment. See, e.g., *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3d Cir.) (applying fourth amendment administrative search exception to urine and breath testing without explicitly deciding the testing constitutes a search), *cert. denied*, 107 S. Ct. 577 (1986).

B. Government Action Requirement

The second question we must consider is whether the federal government's role in promulgating this regulatory scheme is sufficient to subject the tests carried out in accordance with these provisions to the limitations of the fourth amendment. FRA argues that Subpart D merely authorizes private railroads to carry out tests under certain circumstances and that there is no government action involved.

The district court rejected this argument, and FRA did not cross-appeal after prevailing in the district court. FRA may nevertheless raise the argument on appeal because it does not seek to expand the relief granted by that court. *United States v. New York Telegraph Co.*, 434 U.S. 159, 166 n.8 (1977). It is well settled that a prevailing party, "though he files no cross-appeal or cross-petition, may offer in support of his judgment any argument that is supported by the record, whether it was ignored by the court below or flatly rejected." 9 Moore's Federal Practice ¶ 204.11[3] (2d ed. 1985) (footnote omitted).

On the merits, the district court was correct in finding government action in the authorized testing provisions relying on the authority of *United States v. Davis*, 482 F.2d 893, 896-904 (9th Cir. 1973). In *Davis* we considered the applicability of the fourth amendment to airport security searches conducted by private airline employees.

We began our inquiry with the observation that the fourth amendment applies to a search whenever the government participates in any significant way in a total course of conduct leading to a search. *Id.* at 897. We pointed out that the determining factor "is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means." *Id.* (quoting *Lustig v. United States*, 338 U.S. 74, 79 (1949)). After reviewing the history of concern with hijacking and the development of a nationwide anti-hijacking program conceived, directed, and implemented by federal officials in cooperation with air carriers, we concluded that the government's role in the airport search program had been a dominant one. *Davis*, 482 F.2d at 897-904. We said that even if it could be characterized accurately as mere encouragement or, in the language of *United States v. Guest*, 383 U.S. 745, 755-56 (1966), as "peripheral, or . . . one of several cooperative forces leading to the [alleged] constitutional violation," it was still significant for fourth amendment purposes. *Davis*, 482 F.2d at 904. We expressly noted that it made no difference that the search was conducted by a private airline employee because the search was part of the overall, nationwide anti-hijacking effort and thus constituted "state action" for fourth amendment purposes. *Id.* It also made no difference that the search was conducted prior to the issuance of formal regulations mandating pre-boarding searches. *Id.* at 902-04.

In this case, the government's involvement in developing the rule and in regulating its implementation clearly amounts to significant involvement for fourth amendment purposes. FRA's regulation was issued under the authority of the Federal Railroad Safety Improvement Act of 1970, 45 U.S.C. §§ 421-444, and the Accident Reports Act of 1910, 45 U.S.C. §§ 38-43. The Safety Act invests the

Secretary of Transportation with authority to regulate "all areas of railroad safety," 45 U.S.C. § 431, and empowers him to conduct investigations, issue subpoenas, require production of documents, and delegate to qualified persons functions concerning the examination, inspecting, and testing of railroad equipment, operations, and persons, 45 U.S.C. § 437. Authority to administer the Act has been delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(m).

The Accident Reports Act provides that railroads must make monthly reports to the Secretary of Transportation of all collisions, derailments or other accidents resulting in death, injury or property damage. The Secretary is authorized to investigate all railroad accidents resulting in serious injury or property damage, and, to that end, is granted certain appropriate powers, including the power to require the production of evidence and, when deemed to be in the public interest, to make reports of such investigations stating the cause of the accident. 45 U.S.C. §§ 38-40. That statute also authorizes the issuance of "such rules . . . as are necessary." 45 U.S.C. § 42. The Secretary's authority under this Act too has been delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(c)(11). The FRA has issued detailed accident reporting regulations, found at 49 C.F.R. Part 225.

FRA safety inspectors conduct investigations across the national rail system on a daily basis to promote compliance with safety regulations. As necessary, the FRA may require cooperation of the railroad company to facilitate the examination of facilities or pertinent records. See *United States v. Missouri Pacific R.R.*, 553 F.2d 1156 (8th Cir. 1977).

FRA developed the regulations at issue here through a process initiated on June 30, 1983 and concluded August 2, 1985. FRA undertook this rulemaking process in

response to a perception that drug and alcohol abuse is a serious problem in the railroad industry posing unacceptable risks to public and employee safety. The general concern with drug and alcohol abuse and the national goal of eradicating that abuse is a matter of common knowledge. For example, the President's Commission on Organized Crime proposed that to reduce the demand for drugs "[t]he President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs." President's Commission on Organized Crime, *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime* at 483 (1986). In response, the President, on September 15, 1986, issued an Executive Order for a "Drug-Free Federal Workplace." Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). These expressions of national concern are mirrored in FRA's effort to develop a workable program of drug testing for the railroad industry. We cannot view the testing provisions, even those which authorize testing by private railroads, as anything less than part of an overall, nationwide anti-drug campaign. Cf. *Davis*, 482 F.2d at 897. Thus the government's role in the railroad drug testing program has been a dominant one, sufficiently significant for fourth amendment purposes.

C. Fourth Amendment Standard

Having found that the fourth amendment applies to drug and alcohol tests conducted pursuant to federal regulatory authority "is only to begin the inquiry into the standards governing such searches. . . . [W]hat is reasonable depends on the context within which a search takes place." *O'Connor*, 107 S. Ct. at 1499 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)). It is generally

settled that " 'except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.' " *O'Connor*, 107 S. Ct. at 1499 (quoting *Mancusi v. DeForte*, 392 U.S. 364, 370 (1968)).

1. Warrant Requirement

It appears clear that this is a case in which a warrant is not required. Although a warrant is generally required to make a search reasonable, it is not the *sine qua non* of reasonableness. For example, a warrantless inspection of commercial enterprises in a closely regulated industry is reasonable within the meaning of the fourth amendment if the inspection meets certain criteria. *New York v. Burger*, 107 S. Ct. 2636 (1987). In another context the Court has held that public employer intrusions on the constitutionally protected privacy interests of government employees for work-related purposes and for investigations of work-related misconduct should be judged by the standard of reasonableness under all circumstances. *O'Connor*, 107 S. Ct. at 1502. The Court has also held that the warrant requirement is unsuited to the school environment because it would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). In general the Court has indicated that the warrant requirement is dispensed with when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). Such an exception is carved out only when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

In the seminal case on body fluid testing, the Court held that compelled blood tests in a drunk driving case are constitutionally permissible without a search warrant. *Schmerber v. California*, 384 U.S. 757 (1966). The Court stated that even though the warrant requirement could be dispensed with, there still had to be probable cause to initiate such a test. It said

[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear.

Id. at 769-770. The *Schmerber* Court found the blood test reasonable without a warrant because the same facts which gave probable cause for the arrest also suggested the relevance of the blood test, and because the blood test was a reasonable test with little risk, trauma or pain and was conducted in a reasonable manner. *Id.* at 770-771. RLEA concedes that a warrant is not necessary to legitimate body fluid testing under the regulations but argues that the *Schmerber* requirement for something like probable cause¹⁰ must exist to justify the testing of any particular individual.

¹⁰ Recently the Supreme Court has explained that the "clear indication" specified in *Schmerber* was not a third standard between probable cause and reasonable suspicion, but was simply another way of stating that police must have a particularized suspicion that the evidence sought might be found within the body of the individual. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

We can agree that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant. *Schmerber*, 384 U.S. at 770. Compare *T.L.O.*, 496 U.S. at 340 (to require a teacher to obtain a warrant before a search when she suspects an infraction of school rules would unduly interfere with the maintenance of discipline in the schools).

2. Exceptions to Warrant Requirement

Although we agree that drug and alcohol testing can be conducted without a warrant, we do not believe the case fits within one of the "carefully defined classes of cases," *Mancusi*, 392 U.S. at 370, previously identified by the Supreme Court as reasonable without a warrant.¹¹ The most relevant prior exemption which is applicable in the eyes of FRA and the district court, is the administrative search. The district court specifically found that these regulations should be evaluated under the standards applicable to administrative inspections of pervasively

¹¹ Such well-defined exceptions include: (1) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383 (1914); (2) the "automobile exception," *Carroll v. United States*, 267 U.S. 132 (1925); (3) hot pursuit, *Warden v. Hayden*, 387 U.S. 294 (1967); (4) stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968); (5) plain view, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); (6) border searches, *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); (7) administrative searches of closely regulated industries, *New York v. Burger*, 107 S. Ct. 2636 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); (8) inventory searches, *Illinois v. LaFayette*, 462 U.S. 640 (1983); (9) searches of school-children's possessions at school, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); (10) consent, *United States v. Mendenhall*, 446 U.S. 544 (1980).

regulated industries. See *New York v. Burger*, 107 S. Ct. 2636 (1987) (automobile junkyard); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mines); *United States v. Biswell*, 406 U.S. 307 (1978) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor).

The administrative search doctrine applied to closely regulated industries has undergone significant alterations over the years. In the first such case, the Court approved the reasonableness of warrantless searches and seizures in the liquor industry because of the long history of Congressional regulation of the industry. *Colonnade Catering*, 397 U.S. at 75-77. In *Biswell*, 406 U.S. at 315-16, the Court approved of warrantless searches conducted pursuant to the Gun Control Act not because of a deeply rooted history of federal regulation, but because of the need for flexibility and because the prerequisite of a warrant would frustrate the goals of inspection. The Court found that owners of businesses know they are subject to inspection from the time they choose to engage in a pervasively regulated business, thus there is only a limited threat to expectations of privacy. *Id.* at 316. The Court has further explained, in a case treating inspection of mines, that a congressionally established regulatory scheme and a comprehensive and defined federal regulatory presence lets the owner of commercial property know that his property will be periodically inspected. *Dewey*, 452 U.S. at 603. Such an inspection program, in terms of certainty and regularity of application provides a constitutionally adequate substitute for a warrant. *Id.* In that case, rather than leaving the frequency and purpose of inspections to the unchecked discretion of government officers, the Act established a predictable and guided federal regulatory presence. *Id.* at 604. When no such regulatory plan is built into the legislation regulating a specific industry, the Court has required

a warrant as a condition of a reasonable search. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (OSHA inspections not directed at a specific regulated industry; warrant necessary to demonstrate an inspection conforms to an established administrative plan).

The most recent articulation of this exception to the warrant requirement emphasizes that warrant and probable cause requirements which fulfill the traditional fourth amendment standard of reasonableness have lessened application in the context of a closely regulated industry because the owner or operator of commercial premises in such an industry has a reduced expectation of privacy. *Burger*, 107 S. Ct. at 2643. A warrantless inspection of the commercial premises of a pervasively regulated business will be deemed to be reasonable only if three criteria are met: (1) a "substantial" government interest informs the regulatory scheme; (2) warrantless inspections must be necessary to fulfill the regulatory scheme; and (3) the inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Id.* at 2643-44. As a substitute for a warrant the regulatory statute must perform the two functions of a warrant: it must advise the owner of the premises that the search is made pursuant to law and has a properly defined scope and it must limit the discretion of inspecting officers. *Id.* at 2644.

We do not believe the administrative inspection exception is applicable to the regulatory scheme before us. All of the decisions in this line of cases have upheld warrantless searches of property, not of persons, and we decline to make such an extension in this case. The Court, in reviewing the closely regulated industry cases, has stressed that no reasonable expectation of privacy could exist "for a proprietor over the stock of such an

enterprise." *Burger*, 107 S. Ct. at 2642 (quoting *Marshall*, 436 U.S. at 313) (emphasis added); accord *United States v. Munoz*, 701 F.2d 1293, 1299 (9th Cir. 1983). See, also, *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985) (approving inspections of family day care homes in the areas where and when business is being conducted because day care centers fall within the pervasively regulated business exception); *Balelo v. Baldridge*, 724 F.2d 753, 767 (9th Cir.) (en banc) (approving government inspection of fishing vessels for violations of the Marine Mammal Protection Act, but noting that the regulation does not authorize searches of the persons, personal effects, or living quarters of the Captains and their crews, and that such searches would have to be justified independently under the fourth amendment), cert. denied, 467 U.S. 1252 (1984); *United States v. Raub*, 637 F.2d 1205 (9th Cir. 1980) (warrantless boarding of vessels approved as authorized by statute and aspect of historical and pervasive regulation of salmon-fishing industry).

There is no question that the railroad industry has experienced a long history of close regulation. See *supra* at 11-12. This regulation has diminished the owners' and managers' expectations of privacy in railroad premises, but we do not believe it has diminished the individual railroad employee's expectation of privacy in his person or his body fluids. Although some railroad safety regulations are directed at employees, such as the hazardous materials transportation laws, 49 U.S.C. §§ 1801-1812, the vast bulk of safety legislation is directed at owners and managers of railroads, not their employees. By this we mean that the inspections and investigations to assure compliance with the regulations are directed at the premises, equipment, rolling stock and books and records of the owners and

managers, not at their employees. 45 U.S.C. § 437(b). Further, the duty to comply with the regulations and the sanctions and penalties for violations of the regulations fall on the owners and managers, not their employees.¹²

We emphasize this point to distinguish the case before us from the Third Circuit's decision in *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986), which held the administrative search exception applies to warrantless breath and urine testing of jockeys in the heavily regulated horse-racing industry. Critical to the *Shoemaker* court's analysis was the fact that jockeys, as the persons engaged in the regulated activity, are the principal regulatory concern. *Id.* The regulation of horse racing in New Jersey is designed to protect the wagering public and its confidence in the integrity of the industry, and to those ends has always been geared to assuring the integrity of racetrack employees through licensing provisions and restrictions on employing persons convicted of a crime involving moral turpitude. *Id.* at 1141-42. In contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities. Railroad employees are not licensed, nor is their employment conditioned upon the

¹² See, e.g., 45 U.S.C. § 438 (penalties for violation of the Federal Railroad Safety Act fall on railroads); 45 U.S.C. § 64a(a)(1) (penalties for violation of the Hours of Service Act fall on railroads); 45 U.S.C. § 13 (penalties for violation of the Safety Appliance Acts fall on railroads); 45 U.S.C. § 34 (penalties for violation of the Locomotive Inspection Act fall on railroads); 45 U.S.C. § 39 (penalties for violation of the Accident Reports Act fall on railroads); 49 U.S.C. § 26 (penalties for violating the Signal Inspection Act fall on railroads).

absence of a prior criminal record. The Secretary of Transportation is expressly precluded from setting standards for qualifications of railroad employees, 45 U.S.C. § 431(a), while the New Jersey Racing Commission has always had the authority to prescribe the conditions under which licenses may be issued or revoked. *Shoemaker*, 795 F.2d at 1141. Railroad safety regulations have not put railroad employees on notice that their participation in the industry reduces their legitimate expectations of privacy in the integrity of their bodies. Certainly there are industry requirements of health and fitness, but these have been matters of private negotiation between railroads and employees not matters of federal regulation. See, e.g., *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, Nos. 85-4137 and 85-4138.

Thus we conclude that the administrative inspection standard, which allows warrantless searches of the premises of pervasively regulated industries, is not applicable to searches of persons even when they are employed in those industries, unless the employees are the principal concern of the industry regulation.

We note that FRA actually argues for an extension of a broader administrative search doctrine than that developed in the pervasively regulated industry cases. FRA relies principally on *Camara v. Municipal Court*, 387 U.S. 523 (1967), which required a warrant based on administrative probable cause to inspect premises to assure compliance with fire, health and safety codes. The Court held that area code-enforcement inspections of municipal housing are reasonable because: (1) such programs have a long history of judicial and public acceptance; (2) there is no other canvassing technique which would achieve acceptable results; and (3) the inspections are neither personal in nature nor aimed at discovery of crime. *Id.* at 537. We

think the animating principles of this case have little application to the drug testing at issue here. *Camara*, in common with the closely regulated industry cases, only approved inspections of property which are not personal in nature. *Id.*

FRA also argues that the Supreme Court and the Ninth Circuit have frequently approved of searches of persons conducted without probable cause or individual suspicion. It cites *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upheld brief vehicle stops at fixed checkpoints to question occupants without individual suspicion); *United States v. Des Jardins*, 747 F.2d 499, 505-06 (9th Cir. 1984) (upheld pat-down search of person at border based only on minimal showing of suspicion), *partially vacated*, 772 F.2d 578 (9th Cir. 1985); *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978) (approved routine metal detector and pat-down searches of attorneys entering courthouse); *Davis*, 482 F.2d at 910-11 (approved pre-boarding searches of airline passengers).

We do not consider these cases to be in point. Stops for questioning, pat-down searches and magnetometer searches do not approach the degree of intrusiveness involved in toxicological testing of body fluids. The consistent rationale of the cases is that a vital governmental interest in, for example, national self-protection, *Martinez-Fuerte*, 428 U.S. 543, in the safety of judicial officers, *McMorris*, 567 F.2d 897, or in combatting terrorism and hijacking, *Davis*, 482 F.2d at 897, may justify a minimal intrusion. We do not consider breath, blood or urine testing to be similarly minimal intrusions. See *Storms*, 600 F. Supp. at 1220 (urinalysis entitled to same level of scrutiny accorded body cavity searches because both offend human dignity and privacy and both are degrading); *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa

1985) ("[U]rine is discharged and disposed of under circumstances where the person has a reasonable and legitimate expectation of privacy." Court also found significant the interest in maintaining privacy in personal information contained in body fluids.), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987); *Tucker v. Dickey*, 613 F. Supp. 1124 (W.D.Wis. 1985) (urinalyses and body cavity searches equally degrading).

We still must decide what standard governs inquiry into the reasonableness of such a drug testing program. The Supreme Court has provided some guidance for determining the applicable standard of reasonableness although it has expressly declined to address the proper standard for analyzing employee drug and alcohol testing. *O'Connor*, 107 S. Ct. at 1504 n.**.

3. Reasonableness

The Supreme Court has said that determining the "standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *O'Connor*, 107 S. Ct. at 1499 (quoting *United States v. Place*, 462 U.S. 696, 702 (1983)); *National Fed'n of Fed. Employees*, 818 F.2d at 942.

In this case, on one side of the balance are the railroad employees' reasonable expectations of privacy, *T.L.O.*, 469 U.S. at 338, *O'Connor*, 107 S. Ct. at 1497-99, and on the other side is the governmental interest in the safe and efficient operation of the railroads for the benefit of railroad employees and the public affected by that operation. See *O'Connor*, 107 S. Ct. at 1501 (government in-

terest in efficient and proper operation of the workplace justifies search of employee's desk and files); *National Fed'n of Fed. Employees*, 818 F.2d at 942 (government interest in efficient operation of the workplace offered as justification for drug testing of federal employees); *McDonell*, 809 F.2d at 1308 (government interest in determining whether prison personnel are using or abusing drugs which would affect their ability to safely perform their work may support the reasonableness determination).

We believe that accommodation of railroad employees' privacy interest with the significant safety concerns of the government does not require adherence to a probable cause requirement. *Cf. T.L.O.*, 469 U.S. at 341. In this case, as in *T.L.O.*, the legality of the search for evidence of drug or alcohol impairment depends on the reasonableness, under all the circumstances of the search. To be reasonable, the search must satisfy both prongs of a two-prong test. First, we must determine "whether the [search] was justified at its inception," *T.L.O.*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Second, we must determine "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,'" *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 20).

a. Justified at Inception

Finding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought. In *O'Connor* this standard meant there had to be reasonable grounds for suspecting the search of an

employee's office would turn up evidence that he was guilty of work-related misconduct. 107 S. Ct. at 1503. In *T.L.O.* this standard meant there had to be reasonable grounds for suspecting that the search of a student's purse would turn up evidence that the student had violated or was violating the law or school rules. 469 U.S. at 342. In our case, this standard means there must be reasonable grounds for suspecting the search will turn up evidence the employee has violated the industry rule and federal regulation, 49 C.F.R. § 219.101, prohibiting possession or use of alcohol and controlled substances on the job and prohibiting working while under the influence of alcohol or drugs.

The Supreme Court has not determined whether "reasonable grounds for suspecting" necessarily means that there must be individualized or particularized suspicion. *O'Connor*, 107 S. Ct. at 1503; *T.L.O.*, 469 U.S. at 342 n.8. These cases both involved searches of property,¹³ not persons, and in both cases individualized suspicion did exist, but the Court refused to say that it was an irreducible minimum of a reasonable search. *O'Connor*, 107 S. Ct. at 1503; *T.L.O.*, 469 U.S. at 342 n.8.

We hold that particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception. Accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug

¹³ The holding of *T.L.O.* appears to be broader than the facts required, in that the Court said "[W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority." 469 U.S. at 340. As we have discussed, dispensing with the warrant requirement does not end the inquiry into the reasonableness of a search, which requires different degrees of suspicion to warrant different degrees of intrusion.

impairment in any one railroad employee, much less an entire train crew. Broad based testing, without particularized suspicion, such as that mandated by the new regulations, 49 C.F.R. §§ 219.201, 219.301(b)(2) and (3), has been frequently disapproved. *See, e.g., Amalgamated Transit Union*, 663 F. Supp. at 1568 (random testing of bus drivers unreasonable with less than reasonable suspicion); *Feliciano*, 661 F. Supp. at 589 ("a reasonable individualized suspicion that a police officer is using illicit drugs must be required for urinalysis to be reasonable"); *American Fed'n Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (federal police officers cannot be tested without reasonable suspicion); *Lovvorn*, 647 F. Supp. 857 (firefighters cannot be tested without individualized suspicion); *Capua*, 643 F. Supp. 1507 (random testing of firemen and policemen unconstitutional); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57 517, N.Y.S.2d 456, 510 N.E.2d 325 (1987) (teachers cannot be tested without particularized suspicion). *But see National Treasury Employees Union*, 816 F.2d 170 (customs officials may be required to take test when they apply for certain sensitive jobs); *McDonell*, 809 F.2d 1302 (prison guards may be subjected to uniform or systematic random urine testing); *Shoemaker*, 795 F.2d 1136 (jockeys may be subjected to random urinalysis and uniform breathalyzer tests).

We think when testing is undertaken to detect drug or alcohol abuse as a means of improving the safe operation of a railroad, it poses no insuperable burden on the government to require individualized suspicion. The reasonable suspicion standard currently codified at 49 C.F.R. §§ 219.301(b)(1) and (c)(2) is adequate to safeguard the privacy expectations of railroad employees, and we believe it should be incorporated into the manda-

tory testing provisions set out in 49 C.F.R. § 219.201 and the other authorized testing provisions set out in 49 C.F.R. § 219.301(b)(2) and (3).

Requiring particularized suspicion before testing for drug or alcohol impairment comports with a great weight of authority holding that a warrantless search of a person is unconstitutional without a degree of specific suspicion. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal" *T.L.O.*, 469 U.S. at 342 n.8. *See e.g., McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978) (pat-down search of visitor to courthouse more intrusive than magnetometer search and can be performed only with suspicion caused by activation of magnetometer); *Thorne v. Jones*, 765 F.2d 1270, 1277 (5th Cir. 1985) (reasonable suspicion standard governs strip searches of visitors to prison), *cert. denied*, 475 U.S. 1016 (1986); *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982) (same); *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 204-05 (2d Cir. 1984) (reasonable suspicion standard governs strip searches of correction officers); *United States v. Ogberaha*, 771 F.2d 655, 658 (2d Cir. 1985) (reasonable suspicion governs strip searches at the border), *cert. denied*, 474 U.S. 1103 (1986); *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967) (same).

Although we hold that the testing provisions in 49 C.F.R. §§ 219.201 and 219.301(b)(2) and (3) are constitutionally infirm because they do not meet the first prong of the reasonableness test, we turn to a consideration of the second prong.

b. *Related in Scope*

The second prong of the reasonableness test is whether the search is reasonably related in scope to the circum-

stances which justified the interference in the first place. *T.L.O.*, 469 U.S. at 341. In *T.L.O.* the Court indicated that a search of a school child which was justified at its inception would also be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. *Id.* at 342. We apply this standard to the regulations as they would stand with particularized suspicion incorporated as a necessary predicate to all testing.

The professed purpose of the testing program is to detect current drug intoxication and impairment and thereby to improve rail safety through the deterrent effect of the testing. We see one flaw in the reasonableness of this approach to the problem. Blood and urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment. See *Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987); Dubowski, Dr., *Drug-Use Testing: Scientific Perspectives*, 11 Nova L. Rev. 415, 526-29 (1987); Hudner, *Urine Testing for Drugs*, 11 Nova L. Rev. 553, 556-57 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L. Rev. 605, 632 (1987). Rather, the state of the art drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug. Joseph, *supra* at 632. For this reason we think it imperative that drug testing be undertaken only when there is individualized suspicion because the combination of observable symptoms of impairment with a positive result on a drug test would provide a sound basis for appropriate disciplinary action. The liter-

ature on drug testing is replete with references to the unreliability of results. See *Testing for Drug Use in the American Workplace: A Symposium*, 11 Nova L. Rev. (1987) *passim*. Requiring individualized suspicion would help to alleviate some of the harsh consequences of exclusive reliance on test results.

If individualized suspicion becomes a predicate for all testing the regulations should withstand scrutiny under the scope prong of the reasonableness standard. Although body fluid testing is highly intrusive, if it were occasioned only by individualized suspicion, the intrusion would not be excessive in light of the nature of the suspected rule violation. Cf. *T.L.O.*, 469 U.S. at 342.

The manner of conducting the tests is generally reasonable in that they are performed in medical facilities. 49 C.F.R. § 219.203(c). The intrusiveness of the process of urine testing has been reduced as much as is practicable in that only personnel of the medical facility may supervise the sample collection. 49 C.F.R. § 219.305(a).

The implied consent provision, 49 C.F.R. § 219.11¹⁴ adds little to the reasonableness of the testing program although it does put employees on notice that they may be required to submit to such tests. See *National Treasury Employees Union*, 816 F.2d at 178. The consent feature does not add to the reasonableness in our case as it did in *National Treasury Employees Union* because there an employee could totally forego drug screening with no adverse inferences if he withdrew his application for a job transfer. *Id.* Railroad employees do not have that option.

¹⁴ § 219.11(a) provides "Any employee who performs covered service for a railroad on or after February 10, 1986, shall be deemed to have consented to testing as required in Subpart C and D of this part; and consent is implied by performance of such service."

If individualized suspicion is included in the preconditions for testing, we would conclude that the least intrusive means have been selected to meet the legitimate governmental objectives of the tests. *See id.* at 180. We are less convinced of the effectiveness of the tests in detecting drug impairment, *id.*, but think the program will serve reasonably well as a deterrence to on-the-job use of drugs and alcohol.

D. Consent

FRA argues the rule satisfies the fourth amendment even under the stricter standard of reasonable suspicion because of the implied consent provision in 49 C.F.R. § 219.11. It is clear that valid consent to a search eliminates the need for a warrant of probable cause. *United States v. Mendenhall*, 446 U.S. 544 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). However, when a search has been determined to be constitutionally unreasonable, the consent feature cannot save it. *National Fed'n of Fed. Employees*, 818 F.2d at 943. As one court expressed it, "advance consent to future unreasonable searches is not a reasonable condition of employment." *McDonell*, 612 F. Supp. at 1131 (emphasis in original).

E. Conflicting Authority

We are mindful that our decision may be seen as conflicting with decisions of other circuits. *E.g. National Treasury Employees Union*, 816 F.2d 170; *McDonell*, 809 F.2d 1302; *Shoemaker*, 795 F.2d 1136; *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

In *National Treasury Employees Union*, the Fifth Circuit considered a plan for testing customs officials seeking

transfer to jobs which involve interdiction of illicit drugs, require carrying of a firearm or involve access to classified information. 816 F.2d at 173. As a voluntary screening test for those applying for transfers, this program is similar to FRA rules for pre-employment drug screens codified at 49 C.F.R. Part 219, Subpart F. These rules are not before us, and of course we express no opinion as to their constitutionality. We do not think the factors the Fifth Circuit considered in analyzing the reasonableness of the testing program, 816 F.2d at 177-82, are precisely the factors we consider relevant, because the court did not consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception, *O'Connor*, 107 S.Ct. at 1503; *T.L.O.*, 469 U.S. at 341.

Likewise, the *McDonell* court did not pose this question in analyzing and upholding the reasonableness of uniform or systematic random testing of prison guards. 809 F.2d at 1308. Rather the court simply weighed the strong interest in prison security against the urinalyses which it held to be relatively less intrusive than body searches and found the intrusion into the guards' expectation of privacy to be reasonable. *Id.* We do not agree that urine testing is a lesser intrusion than body searches.

We have already indicated that *Shoemaker* is distinguishable because the Third Circuit adopted the pervasively regulated industry rationale to uphold testing of jockeys and we do not consider that rationale applicable to the employees in our case. 795 F.2d at 1141-42.

Finally, we do not consider the analysis of the *Suscy* court to be particularly persuasive, even though the case, because it involves bus drivers, is factually similar to the case before us. 538 F.2d 1264. The Seventh Circuit held,

without very thorough analysis, that bus operators have no reasonable expectation of privacy and that even if they did, the tests given were reasonable because they were given only to operating employees directly involved in serious accidents or suspected by two supervisory employees of being under the influence. *Id.* at 1267. See Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 Am. Business L. J. 309, 324-25 (1986) (criticizing *Suscy* reasoning). Our evaluation of the reasonableness of the tests at issue in this case is that they fail to meet the requirement of being justified at their inception by an expectation the tests will reveal the sought after information. Because the *Suscy* court did not apply that test, its conclusions do not influence the outcome in our case.

II. STATUTORY ARGUMENTS

RLEA raises a number of statutory objections to the regulations which we find unpersuasive.¹⁵ RLEA suggests that the regulations violated the Federal Railroad Safety Act in that the FRA lacks the statutory authority to delegate testing under Subpart D to the railroads, and to permit them to conduct it without particularized suspicion. This argument is without merit. 45 U.S.C. § 437(a) authorizes the Secretary to delegate to any qualified persons functions respecting examination, inspection and testing of persons as necessary to carry out the provisions of that subchapter. Thus, because the Secretary has the power to perform the searches in question here, he has the power to delegate that authority to other qualified persons.

¹⁵ The district court did not reach any of these questions but because they are legal issues we need not remand for further consideration.

The RLEA argues from *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), which addressed warrantless inspections to enforce OSHA, that any statutory scheme mandating warrantless searches is constitutionally infirm. *Marshall* does not go so far. The Court specifically stated it was concerned only with OSHA, and that the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321. Thus, the scheme at issue in this case need only pass constitutional muster on its own terms.

RLEA also argues that the regulations violate the Federal Rehabilitation Act by unlawfully discriminating against the handicapped by causing dismissal of employees who can perform their jobs despite drug or alcohol use. The Federal Rehabilitation Act prohibits discrimination against otherwise qualified handicapped individuals by any program receiving federal financial assistance. 29 U.S.C. § 794 (1982). Assuming the Act applies to railroads, since they generally receive federal assistance or have federal contracts, it is clear the testing regulations are not violative of the Rehabilitation Act.

The regulations do not mandate any discriminatory treatment of those who are handicapped, or even of those who "flunk" the drug or alcohol tests. Any disciplinary action is left up to the individual employers and is a subject for collective bargaining between the unions and railroads.

Furthermore, the Rehabilitation Act does not cover alcoholics or drug abusers whose employment, by reason of current alcohol or drug abuse, would constitute a threat to property or safety. 29 U.S.C. § 706(7)(B). It appears from the plain language of the statute that only alcoholics or drug abusers whose problems are under control are protected from discriminatory treatment.

Finally, RLEA argues that the regulations violate protections of the Railway Labor Act by denying employees

the right to have union representation at the testing procedures. This argument has no merit. It derives the right to have a representative present from the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, the Court held that an employer's refusal of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8(a)(1) of the N.L.R.A., 29 U.S.C. § 158(a)(1), because it interfered with § 7 rights to engage in concerted activity. 29 U.S.C. § 157. 420 U.S. at 252-53.

Weingarten does not control this case. The Court specified that the right to union representation arises only upon the employee's request. *Id.* at 257. Here, the regulations are silent as to a person's right to have representation, and the situation has not yet arisen in which an employee has asked for and been refused such representation. Thus, the question is not ripe for review.

III. OTHER CONSTITUTIONAL OBJECTIONS

RLEA contends that, in addition to its constitutional infirmity under the fourth amendment, the rule also impermissibly impinges on the fundamental right of privacy. See *Roe v. Wade*, 410 U.S. 113 (1973). The privacy interest protected by *Roe v. Wade* and its progeny has not been fully delineated, see *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), but thus far has been extended to include interests in autonomous decision making in the areas of family planning and contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and family living arrangements. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Any right to

personal autonomy in choosing to use alcohol or drugs has not yet been protected, although there is a parallel right to keep certain information about drug use private. *Whalen v. Roe*, 429 U.S. 589 (1977). In *Whalen* the Court found the gathering and storage of data pertaining to prescription drug use did not pose a grievous threat to the privacy interest in avoiding disclosure of personal matters or the privacy interest in independent decision making.

The Third Circuit held that one aspect of the reasonableness of the jockey testing program was the guarantee of confidentiality incorporated in the statutory scheme. *Shoemaker*, 795 F.2d at 1144. The regulations before us lack this safeguard, but we believe the time to litigate the question is after some inappropriate breach of confidentiality.

RLEA's final constitutional argument is that the regulations are underinclusive and thus offend due process by arbitrarily discriminating among similarly situated classes of persons. Of course the equal protection provisions of the fourteenth amendment have been made applicable to the federal government through the due process clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). But equal protection requires only that there be a rational relationship between a classification scheme and a legitimate government objective. *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982). The objective of railway safety is unquestionably legitimate. The targeting for testing of employees covered by the Hours of Service Act, 45 U.S.C. §§ 61-66, and employees performing the same services as covered employees, 49 C.F.R. § 219.5(d), is reasonably related to the goals of the testing program. The Hours of Service employees are "individual[s] actually engaged in or connected with the movement of any train." 45 U.S.C. § 61(b)(2). Congress enacted this legislation to enhance

railroad safety by regulating the hours of employees most involved in the operation and therefore most responsible for the safe operation of trains. It makes sense to mandate drug and alcohol testing of the same group for the same reasons.

But RLEA argues this does not permit testing of supervisory employees who may also be responsible for railway accidents. However, as FRA points out, supervisory personnel are already subject to testing at the discretion of the railroads, and if they perform any "covered service" they will be subject to testing under the new rule too. Thus, the rule does not offend the equal protection clause.

CONCLUSION

Because the district court applied the wrong legal standard in evaluating the fourth amendment issue in this case, it erroneously granted summary judgment for FRA. Applying the test of reasonableness we conclude that intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment. The judgment of the district court is REVERSED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

The primary issue before this court is whether the district court correctly determined that the Federal Railroad Administration's regulations requiring restraints to conduct blood or urine tests of crew members after serious accidents or incidents and authorizing the conduct of breath or urine tests, upon reasonable suspicion or upon an indication of a deficiency in an employee's safety sensitive functions as a result of an employee's involvement in certain accidents, incidents or rule violations, do not violate the fourth amendment. The district court concluded that, because railroads and railway employees are closely regulated by the government to promote public safety, the balance between this valid governmental interest and the right of an individual to be free from an invasion of privacy must be struck in favor of the regulatory scheme. I would affirm the district court's judgment.

I

The majority has concluded that, notwithstanding that railroads are closely regulated industries, the exception to the requirement of a warrant and probable cause for searches involving closely regulated industries does not apply to the search of the employees of such enterprises. The majority's decision is in direct conflict with the Third Circuit's opinion in *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 577. In *Shoemaker*, the court held that warrantless breathalyzer and urine tests of voluntary participants in the highly regulated horse racing industry are reasonable under the fourth amendment. The majority in the instant matter attempt [*sic*] to distinguish *Shoemaker* on the ground that in the regulation of horse racing, jockeys are "the principal

regulatory concern." Majority op. at 21. In further support of its refusal to follow *Shoemaker*, the majority states, "[i]n contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities." *Id.*

Contrary to the majority's argument, the government has a long tradition of regulating the conduct of railway personnel to promote public safety. The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs. As early as 1907, for example, Congress set limits on the number of working hours industry personnel may undertake per day. 45 U.S.C. § 62(a)(1) (1982). This legislation:

was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions.

Atchison, T. & S.F. Ry. Co. v. United States, 244 U.S. 336, 342 (1916).

The government has promulgated a number of regulations which mandate safe working practices by railroad personnel. See e.g., 49 C.F.R. §§ 218.1-218.30 (1986) (requiring that workers follow certain prescribed safety procedures when co-workers are engaged on rail tracks); 49 C.F.R. § 218.37 (1986) (requiring that workers follow certain prescribed safety procedures when trains are running at reduced speeds); 49 C.F.R. § 220.61 (1986) (requiring certain prescribed safety procedures be followed when transmitting or receiving orders). Additionally, Congress

has declared that railroad personnel can be held criminally liable for violating certain safety rules. See 49 U.S.C. § 1801 (1982) (providing criminal penalties from the knowing transportation of hazardous materials); see also 45 U.S.C. § 438 (1982) (criminal penalties for false entries in accident reports).

The majority also reasons that railroad workers, unlike jockeys, do not have diminished expectations of privacy with respect to their use of drugs or alcohol. Majority op. at 20. This argument ignores the fact that railway employees were subject to safety rules such as the one denominated as Rule G in the companion cases to this matter *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, No. 85-4137 and 85-4138, which, for a substantial period of time, have prohibited the use of alcohol and controlled substances by employees subject to duty or while on duty and required railway personnel suspected of use to submit to a blood or urine test to clear themselves of suspicion. See *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 620 F. Supp. 163, 169-172 (D. Mont. 1985).

Because the activities of railway personnel are closely regulated to promote safety, I would adopt the well-reasoned opinion in *Shoemaker*, and hold that the closely regulated industry exception to the requirement of a warrant and probable cause applies to blood, breath, and urine tests of railway employees under the specific circumstances prescribed in the regulations challenged in this action.

II

A search of a closely-regulated industry "will be deemed to be reasonable," *New York v. Burger*, ___ U.S. ___,

107 S. Ct. 2636, 2643 (1987), if it meets the following three criteria:

First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made

Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . .

Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."

Id. at 2644 (quoting *Donovan v. Dewey*, 452 U.S. 594, 601-03 (1981); see *Balelo v. Baldrige*, 724 F.2d 753, 764-65 (9th Cir. 1984) (en banc), cert. denied, 467 U.S. 1252. The searches mandated by 49 C.F.R. § 219.201 satisfy this three-pronged test.

The government has a "substantial" interest in requiring that tests be conducted to assure that railroad employees avoid drug or alcohol use which might affect their ability to perform their jobs safely. Drug usage among railroad personnel has been implicated as a potential cause of numerous train accidents which resulted in injury and death. Two such accidents are noted in the companion cases to this matter, *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, Nos. 85-4137 and 85-4138. These accidents caused seven deaths and over \$3 million in property damage. These tragic events were not isolated incidents. They are two examples of a long line of alcohol or drug-related tragedies. See generally T. Manello & F. Seaman, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads* (Department of Transportation Report No. DOT-TSC-1375, 1979). The threat posed by alcohol and drug-related railroad accidents is particularly dangerous in light of the fact that extremely

hazardous materials are often transported by rail. See generally National Transportation Safety Board, Pub. No. NTSB/RAR/83/05, *Railroad Accident Report—Derailment of Illinois Central Gulf Railroad Freight Train Extra 9629 East (GS-2-28) and Release of Hazardous Materials at Livingston, Louisiana, September 28, 1982* (1983) (describing an alcohol-implicated train wreck which resulted in a chemical spill requiring the evacuation of a community of 300 persons for a period of two weeks).

Second, warrantless inspections are "necessary to further [the] regulatory scheme." *Burger*, 107 S. Ct. at 2644 (quoting *Donovan*, 452 U.S. at 600). As the majority recognizes, "the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant." Cf. *Schmerber v. California*, 384 U.S. 757, 770 (1966) (sanctioning warrantless blood testing in drunk driving cases).

Finally, the testing procedures set out in the regulatory scheme "'provid[e] . . . constitutionally adequate substitute[s] for a warrant.'" *Burger*, 107 S. Ct. at 2648 (quoting *Donovan*, 452 U.S. at 603). 29 C.F.R. 219.201 mandates testing upon the occurrence of an accident or rule violation. Thus, railroad employees know "that the inspections to which . . . [they are] subject do not constitute discretionary acts by . . . official[s] but are conducted pursuant to . . ." regulation. *Burger*, 107 S. Ct. at 2648.

The "'time, place, and scope' of the inspection[s]", *id.* (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)), are brought within reasonable bounds by other provisions of the regulatory scheme. Under 49 C.F.R. § 219.205(b), testing must take place "as soon as possible" after the occurrence of an event specified in section 219.201. Under 49 C.F.R. §§ 219.205(c) and 215.305(a),

tests must be conducted by qualified independent medical personnel at independent medical facilities. Finally, regulations such as 49 C.F.R. § 219.307(2)(b) limit the scope of testing to determining whether drugs or alcohol are present in the subject's blood or urine.

The blood and urine testing program clearly satisfies the three-pronged test established in *Donovan and Burger*. Accordingly, I would hold that the contested regulations do not violate the fourth amendment.

III

Reliance on the closely regulated industry exception to the fourth amendment requirement of a warrant and probable cause is *not* necessary to uphold the government's regulations requiring blood and urine tests under carefully prescribed circumstances.

To survive traditional fourth amendment scrutiny, a search must be "reasonable." *O'Connor v. Ortega*, — U.S. —, 107 S. Ct. 1492, 1502-03.

"Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' . . .; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' . . ."

Id. at 1503 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985), and *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The majority's opinion in this matter is also in conflict with decisions of the Fifth Circuit, the Seventh Circuit, the Eighth Circuit, and the District of Columbia Circuit holding that government-compelled drug-testing programs were reasonable under the fourth amendment.

Whether a search is "justified at its inception," involves a careful " 'balancing [of] the need to search . . . against the invasion which the search . . . entails.' " *Terry*, 392 U.S. at 21 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)). This balancing test was applied by the Fifth, Seventh, Eighth and District of Columbia Circuits to determine the reasonableness of toxicological drug testing programs in *National Treasury Employees Union v. Von Rabb*, 816 F.2d 170 (5th Cir. 1987), *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), and *Jones v. McKenzie*, No. 86-5198, slip op. (D.C. Cir. Nov. 17, 1987), and *Division 241 Amalgamated Transit Union v. Suscy*, 538 F. 2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029.

In *Von Rabb*, a union representing employees of the Customs Service mounted a fourth amendment challenge to "a program adopted by the Customs Service requiring employees seeking transfer to certain sensitive jobs to submit to urine testing for drug use." 816 F.2d at 172. The Service initiated the program because its employees "are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use . . . as well as [to] illegal substances themselves." *Id.* at 173. Applying the balancing test, the Fifth Circuit determined that the urine tests were intrusive and undertaken without individualized suspicion, and considered these two factors weighed against finding the program reasonable. *Id.* at 175-77. The court held, however, that these factors were more than outweighed by: (1) the Service's compelling need to assure that its employees maintained integrity, *id.* at 177-78; and (2) the diminished privacy expectations of Service employees, who know from the very nature of their profession "that inquiry may be made concerning their off-the-job use of drugs," *id.* at 180. Persons involved in operating trains should also be presumed to

know that inquiry concerning their off-duty drug and alcohol use is likely because of the danger to others that would flow from operating a train while under the influence of such substances.

In *McDonell*, the Iowa Department of Corrections required correctional officers to submit to urine, blood and breath testing at the request of Department officials. 809 F.2d at 1304. The Department initiated the testing program "to maintain security and intercept contraband." *Id.* at 1306. Applying the balancing test, the Eighth Circuit noted that prison employees [*sic*] "expectations of privacy are diminished while they are within the confines of the prison." *Id.* It found that the Department had a compelling need to determine "whether corrections employees are using or abusing drugs which would affect their ability to safely perform their work within the prison." *Id.* at 1308. The court found this necessity outweighed the correctional officers' diminished privacy interests:

Because the institutional interest in prison security is a central one, because urinalyses are not nearly so intrusive as body searches, and because this limited intrusion into the guards' expectation of privacy is, we believe, one which society will accept as reasonable, we . . . hold that urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons.

Id. at 1308. Similarly, the government had a compelling need to ensure that railway employees be free of alcohol or controlled substances in propelling locomotives across this nation.

In *Jones*, a transportation worker employed by the District of Columbia school system challenged the District's mandatory urine testing program. The program

was initiated in response to "repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while on duty." Slip op. at 3. Applying the balancing test, the District of Columbia Circuit held that urine tests intrude heavily upon the employees' privacy interests and thus "can be outweighed only by strong governmental concerns." *Id.* at 10. The court held, however, that the government's safety concerns were sufficiently compelling to tip the balance against these interests. *Id.* Thus, it held that the tests were justified at the inception:

There can be no doubt whatsoever that the School System's mission of safely transporting . . . children to and from school cannot be ensured if employees . . . are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous. . . .

[T]he danger to a young . . . child, should she be dropped by an attendant or ignored while crossing the street, is obvious. In light of these safety concerns, we find that the School System acted pursuant to a significant and compelling governmental interest in requiring drug testing for Transportation Branch employees as a part of routine employment-related medical examinations.

Id. at 10-11 (footnote omitted). The need to prevent injury or death to pedestrians or motorists in the path of a locomotive operated by substance and alcohol abusers is equally compelling.

In *Suscy*, a bus drivers union challenged a Chicago Transit Authority requirement that "bus operators . . . submit . . . blood and urine tests when they are involved in 'any serious accident.'" 538 F.2d at 1266. Applying the balancing test, the Seventh Circuit held that the clash of interests weighed in favor of holding the tests constitu-

tional: "Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Id.* at 1267.

I would adopt the analysis set forth in these cases to the matter at hand, and hold that the urine and blood examinations mandated by 49 C.F.R. § 219.201 are justified at the inception. I would also recognize that the blood and urine tests required by the regulation are intrusive and hold, nevertheless, that they can be performed in the absence of individualized suspicion. I would hold that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests. As recent history attests, locomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands. The threat posed by drug or alcohol impaired railroad workers transporting hazardous materials across this nation is *far* graver than the potential danger presented by the customs officers in *Von Rabb*, the prison guards in *McDonell* or the transportation workers in *Jones* and *Suscy*.

The Supreme Court has instructed us to " 'balanc[e] the need to search . . . against the invasion which the search . . . entails' " in determining whether a search is justified at the inception. *Terry*, 392 U.S. at 21 (emphasis added) (quoting *Camara*, 387 U.S. at 534-35). The majority in the instant matter has failed to engage in the balancing of interests required by the Court. Instead, the majority focuses solely on the degree of impairment of the workers' privacy interests. Finding that the blood and urine tests are intrusive, the majority quickly proceeds to the conclusion that the tests are not justified at the inception because they are not initiated as the result of individualized suspicion of drug or alcohol use. Majority op. at 25-29.

The second inquiry under the "reasonableness" test is whether the search is " 'reasonably related in scope to the circumstances which justified the interference in the first place.' " *O'Connor*, 107 S. Ct. at 1503 (quoting *T.L.O.*, 469 U.S. at 341) "[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive" *T.L.O.*, 469 U.S. at 342.

As discussed above in relation to the closely-regulated industry test, the searches mandated by 49 C.F.R. § 219.201 are not excessively intrusive. The regulatory scheme provides safeguards which bring the time and place of the testing within reasonable bounds.

The question remains whether the tests "are reasonably related to the objectives of the search." *T.L.O.*, 469 U.S. at 342. The majority concludes that the urine tests bear no reasonable relationship to the program objective of discovering on-the-job drug or alcohol use because they are overbroad: "[T]he tests cannot measure current drug intoxication or degree of impairment. Rather, the state of the art drug tests currently used can discover only the metabolites of various drugs, which are *not* evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug." Majority op. at 29-30 (citations omitted).

The regulatory scheme contains adequate safeguards to counter the problem of overbreadth. 49 C.F.R. § 219.309 (1986) requires the railroads to inform their workers of the overbreadth problem presented by urine tests, and to counsel them to take a blood test if they have ingested drugs anytime within the previous sixty days. Section 219.309(b)(2) requires that railroads provide their workers with the following notice:

Under Federal Railroad Administration (FRA) safety regulations, you may be required to provide a

urine sample after certain accidents and incidents or at any time the company reasonably suspects that you are under the influence of, or impaired by, drugs while on duty. *Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to sixty days before the sample is collected).* As a general matter, the test cannot distinguish between recent use off the job and current impairment. However, the Federal regulations provide that if only the urine test is available, a positive finding on that test will support a presumption that you were impaired at the time the sample was taken.

You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. *The blood test will provide information pertinent to current impairment.* Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.

If you have used any drug off the job (other than a medication that you possessed lawfully) in the prior sixty days, it may be in your interest to provide a blood sample. If you have not made unauthorized use of any drug in the prior sixty days, you can expect that the urine test will be negative; and you may not wish to provide a blood sample.

49 C.F.R. § 219.309(b)(2) (1986) (emphasis added).

The warning required by section 219.309 protects employees from any mistake that might result from the "sensitivity" of the urine testing procedure. The searches mandated by 49 C.F.R. § 219.201 are reasonably related to the objective of determining whether railroad workers are intoxicated on the job.

CONCLUSION

I would affirm the judgment of the district court. The railroad industry is closely regulated because of the serious danger presented by the negligent operation of trains across this nation by alcohol or drug-impaired railway employees. Railroad industry employees have long been restricted by safety rules from ingesting alcohol or controlled substances prior to or during the operation of trains. The government has also imposed safety laws and regulations aimed at protecting the safety of the public and co-workers. Thus, railway employees have a diminished expectation of privacy concerning the detection of their alcohol or drug use.

The closely regulated industry exception to the requirements of the fourth amendment should be applied to these employers [sic] who operate the nation's railroads because of the incalculable risk to public safety posed by alcohol or drug impaired train crews. In balancing the intrusion engendered by blood and urine tests against the risk to lives and property posed by intoxicated train crews, we should hold that such searches are reasonable and consistent with the requirements of the fourth amendment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-85-7958-CAL

RAILWAY LABOR EXECUTIVES' ASSOCIATION, 400 FIRST
STREET, N.W. WASHINGTON, D.C.

AND

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF
ADJUSTMENT, THE SOUTHERN PACIFIC TRANSPORTATION
COMPANY, SUITE 201, 1860 EL CAMINO ROAD,
BURLINGAME, CALIFORNIA 94010

AND

BROTHERHOOD OF LOCOMOTIVE ENGINEERS GENERAL
COMMITTEE OF ADJUSTMENT, THE SOUTHERN PACIFIC
TRANSPORTATION COMPANY, 38750 PASEO PADRE
PARKWAY, FREEMONT, CALIFORNIA 94536

AND

BROTHERHOOD OF RAILROAD SIGNALMEN, 601 WEST GOLF
ROAD, MOUNT PROSPECT, ILLINOIS 60056

PLAINTIFFS

vs.

ELIZABETH DOLE, SECRETARY OF TRANSPORTATION,
400 SEVENTH STREET, S.W., WASHINGTON, D.C.

AND

JOHN R. RILEY, ADMINISTRATOR, FEDERAL RAILROAD
ADMINISTRATION, 400 SEVENTH STREET, S.W.,
WASHINGTON, D.C.

DEFENDANTS

November 26, 1985

Before: The Honorable Charles A. Legge, Judge

* * * * *

THE COURT: Now, it seems to me the one decision I will make here that you can both agree on and perhaps the only one you will agree on is, I do not think that there is much point in my taking this matter under submission and writing a lengthy opinion on it.

I anticipate that whatever the side that does not prevail here will seek an appeal. This is almost a pure issue of law and I'm sure the ninth circuit opinion will be heard on it. And it seems to me that I could perform a better function for all of your clients by making my ruling now, stating the reason for it and then enabling you to get on with whatever processes there are for the appeal. And that is not to say that I have not given some very lengthy consideration to the law and the possibility of writing an opinion on this, and, indeed, my clerks and I have spent many, many hours wrestling with these issues.

What I find is, this situation is one which is not neatly covered by either the plaintiffs' or the government's side of the case and where he represents the following.

So for that the reason, I will state for the record what my reasons are so that the court of appeals will have an adequate opportunity to review that reasoning and apply their own reasoning.

Nevertheless, I don't think a lengthy written opinion and a lengthy period of submission is going to serve the interest of either of your clients or the public.

We are here on cross motions for summary judgment by both the plaintiff and the government. As I said before, I think it's clear from the record that there are no factual issues. That is, that this is a case that is suitable for summary judgment under rule 56.

As I said at the beginning, the basic issue, I believe, is the fourth amendment. I don't believe that there is much

merit to the plaintiffs [*sic*] other challenges to this regulation other than the fourth amendment.

So with respect to the fourth amendment analysis, it's clear that the fourth amendment does prohibit unreasonable searches and seizures and these processes here are indeed searches, certainly intrusive in the sense of a blood test, less intrusive in the sense of urine and breath tests.

Generally, the fourth amendment requires an issuance of a warrant or a finding of probable cause, and it's clear that under the regulations and now, those procedures will be required.

So the issue becomes whether this matter falls within a judicially recognized exception to the requirement for a warrant and probable cause.

The government seeks the application of the exception which deals with the searches involved in connection with highly regulated industries.

Now, in evaluating the application of that exception, I am required under the fourth amendment analysis to do a balancing of the considerations. That is, the fourth amendment prohibits unreasonable searches and seizures, not all searches and seizures, but unreasonable ones and requires in dealing with these exceptions that the consideration be balanced.

In connection with those balancings, the government certainly has a valid public and governmental interest in the production of in the promotion of safety and railway safety, safety for employees, and safety for the general public that is involved with the transportation. It's also obvious from the length of time and the detail in which the regulations have gone that the government has made a sincere attempt to gathering together information and do some balancing of interests on its own.

The individuals, on the other hand, have a valid interest in the integrity of their own bodies from protection of overly invasive, unreasonable invasive tests, and a valid concern over the import and impact of this testing procedure on their employment.

I'm going to tell you now how I'm striking that balance and then I will take the rest of the suspense out of this and get on to the reasons for it.

I am going to hold that the plaintiffs [*sic*] motion for summary judgment is to be denied and the government's motion for summary judgment is to be granted.

In essence, the balance is being struck in favor of the regulatory scheme rather than the individual fourth amendment rights as they apply in this case.

The reason is the following: that it is true that the railroad industry is one of the most extensively regulated industries that we have in interstate commerce; and that the regulation extends not just to the railroads themselves, but a certain amount of regulation of the employees.

I believe in looking at the legislation, there is authority granted to the secretary, and hence, subdelegated to the railroad administration for the adoption of rules in the area of railroad safety. Those acts appear to be under the Railroad Safety Act, the Accident Report Act, Safety Appliance Act, and the Hours of Service Act, plus others that I'm sure I'm missing.

But my point is that, the railroad industry and railroad employees are pervasively regulated. There is an established statutory pattern for it and congress has certainly authorized the secretary to pass regulations in that field.

Now, dealing with the regulation itself. It's clear that the regulation is one that is designed to promote the objectives of safety, which is a valid governmental and public interest.

It also appears that the events that will result in testing are as well defined as a set of regulations could give it. And in the most serious cases, that is, the most pervasive cases, it is an objective event which triggers the testing. So the events requiring testing are well and precisely defined.

There is also genuine attempt on the regulations to limit the scope of the testing requirements to the needs and the events as they have occurred.

There is no coercion on the employee in the sense that nobody is telling the employee that you have to submit to a blood test and forcibly make that requirement. Blood is taken by—blood testing is done by a medical facility. The other body tests also evaluated by an independent facility.

The railroad supervisors do have some discretion in deciding what events have occurred to trigger the testing. But that is an area where their discretion is a limited discretion. Also I do not believe it is vital to the regulation that it is nongovernmental people doing the testing. I believe the railroad safety act specifically authorizes the delegation of and the testing function to nongovernmental persons.

With respect to the consequences under the regulations, there is no direct criminal consequence. I recognize that because evidence has been taken, evidence might be obtained by certain sources, but in violation itself of the regulation, is not criminal.

The penalties under the regulations are perhaps not as well defined as the court would like them. Under Subpart C, if the employee refuses the test, it is clear that the employee is subject to nine month's [sic] suspension, that is certain. But the consequences under C and under D of either not taking the test or failing it are undefined. But I think there appears to be a little dispute between the parties that the consequences of those violations put the matter within the area of employee discipline and employee

management, union relationships under the collective bargaining agreements and under Rule G.

My review of the regulations indicate [sic] that there are circumstances throughout the regulations, although not totally throughout, of instances where hearings and notices and responses are available to the defendant employee if he deems himself to be a defendant.

There is, in addition, restrictions placed upon the railroads and also certain impositions upon them for the improper or neglectful performance of their duty.

Alternative means have been considered and discussed. It appears to me from a balancing of the means selected here by the government has been as interested as it is possible to be and to accomplish the genuine public safety interest, which is to be accomplished.

In addition, there is the consideration of the circumstances, and that is, when an accident occurs or when events occur far from the place where courts or other supervisory procedures are available, there is a real seriousness of the disappearance or loss of the evidence, loss of its value.

Now, that is my analysis of the regulations.

With respect to the applicable law. Under the guidelines of the United States Supreme Court in *Schmerber* and recently discussed in *Winston versus Lee*, I believe the Supreme Court has recognized that there can be circumstances under which blood tests are authorized and are proper under fourth amendment standards.

The line of cases cited by the government of *Donovan* against *Dewey*, U.S. against *Biswell*, and *Colonnade* versus the U.S. does support the government's position that in heavily regulated industries, the warrant—there can be warrantless searches.

Now, those cases, indeed, do not apply to personal type searches, but as I've said, Schmerber and Winston against Lee, have indicated that blood testing under the Fourth Amendment can be proper under certain circumstances. The most nearly applicable case on it's [sic] facts is the Transit Union against Suscy, a decision of the Seventh Circuit. And there does definitely appear to be authority authorizing the use of blood and urine tests for transit employees.

Within our own Ninth Circuit here, it seems to me that the conclusion is supported.

And I must say parenthetically, that none of the cases I refer to really decide this case. I cite them only for the benefit of the Ninth Circuit in indicating where I think the support for my decision comes. They are not foursquare authorities in support.

Within our Ninth Circuit we have the United States versus Davis decisions and the McMorris against Alioto, which authorized searches of persons under certain circumstances.

Rush versus Obledo here in the Ninth Circuit recognized the validity of the exception for—from the fourth amendment requirements for industries that are heavily regulated.

And then the Balelo versus Baldrige dealing with observers on boats, also a Ninth Circuit decision.

All right. Now, that will be the decision of the court.

* * * * *

APPENDIX C

49 C.F.R. Part 219

Subpart B—Prohibitions

§ 219.101 Alcohol and drug use prohibited.

(a) *Prohibitions.* Except as provided in § 219.103—

(1) No employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service;

(2) No employee may report for covered service, or go or remain on duty in covered service while—

(i) Under the influence of or impaired by alcohol;

(ii) Having .04 percent or more alcohol in the blood; or

(iii) Under the influence of or impaired by any controlled substance.

(b) *Controlled substance.* "Controlled substance" is defined by § 219.5 of this part. Controlled substances are grouped as follows: marijuana, narcotics (such as heroin and codeine) stimulants (such as cocaine and amphetamines), depressants (such as barbiturates and minor tranquilizers), and hallucinogens (such as the drugs known as PCP and LSD). Controlled substances include illicit drugs (Schedule I), drugs that are required to be distributed only by a medical practitioner's prescription or other authorization (Schedules II through IV, and some drugs on Schedule V), and certain preparations for which distribution is through documented over the counter sales (Schedule V only).

(c) *Railroad rules.* Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.

(d) *Construction.* This section shall not be construed to prohibit the presence of an unopened container of an

alcoholic beverage in a private motor vehicle that is not subject to use in the business of the railroad; nor shall it be construed to restrict a railroad from prohibiting such presence under its own rules.

§ 219.103 Prescribed and over-the-counter drugs.

(a) This subpart does not prohibit the use of a controlled substance (on Schedule II through V of the controlled substance list) prescribed or authorized by a medical practitioner, or possession incident to such use if —

(1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties; and

(2) The substance is used at the dosage prescribed or authorized.

(b) This subpart does not restrict any discretion available to the railroad to require that employees notify the railroad of therapeutic drug use or obtain prior approval for such use.

Subpart C—Post-Accident Toxicology Testing

§ 219.201 Events for which testing is required.

(a) *List of events.* On and after March 10, 1986, except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraphs (a) (1) through (3) of this section:

(1) *Major train accident.* Any train accident that involves one or more of the following:

(i) A fatality;

(ii) Release of a hazardous material accompanied by —
(A) An evacuation; or

(B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of \$500,000 or more.

(2) *Impact accident.* An impact accident resulting in —

(i) A reportable injury; or

(ii) Damage to railroad property of \$50,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

(b) *Exception.* No test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing.

(c) *Good faith determinations.* (1) The railroad representative responding to the scene of the accident/incident shall determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative shall consider the need to obtain samples as soon as practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgment in making the required determinations.

(2) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(3) A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but its [sic] later determined, after investigation, that one or more of the conditions thought to have required testing were not, in fact, present.

[50 FR 31568, Aug. 2, 1985, as amended at 51 FR 3975, Jan. 31, 1986]

§ 219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* (1) Following each accident and incident described in § 219.201, the railroad (or railroads) shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological testing by FRA.

(2) Such employees shall specifically include each and every operating employee assigned as a crew member of any train involved in the accident or incident. In any case where an operator, dispatcher, signal maintainer or other covered employee is directly and contemporaneously involved in the circumstances of the accident/incident, those employees shall also be required to provide samples.

(3) An employee is excluded from testing under the following circumstances:

(i) In any case of an accident/incident for which testing is mandated only under § 219.201(a)(2) of this subpart (an "impact accident") or § 219.201(a)(3) ("fatal train incident"), if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident.

(ii) The following provisions govern accidents/incidents involving non-covered employees:

(A) Surviving non-covered employees are not subject to testing under this subpart.

(B) Testing of the remains of non-covered employees who are fatally injured in train accidents and incidents is required.

(b) *Timely sample collection.* (1) The railroad shall make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident.

(2) This paragraph shall not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad shall utilize other employees to perform such duties.

(3) In the case of a revenue passenger train which is in proper condition to continue to the next station or its destination after an accident or incident, the railroad shall consider the safety and convenience of passengers in determining whether the crew is immediately available for testing. A relief crew shall be called to relieve the train crew as soon as possible.

(c) *Place of sample collection.* (1) Employees shall be transported to an independent medical facility where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

(2) In the case of an injured employee the railroad shall request the treating medical facility to obtain the samples.

(d) *Obtaining cooperation of facility.* (1) In seeking the cooperation of a medical facility in obtaining a sample under this subpart, the railroad shall, as necessary, make specific reference to the requirements of this subpart.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain a blood sample

after having been acquainted with the requirements of this subpart, the railroad shall immediately notify FRA by toll free telephone, Area Code 800-424-0201, stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required sample.

(e) *Discretion of physician.* Nothing in this subpart shall be construed to limit the discretion of a physician to determine whether drawing a blood sample is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

§ 219.205 Sample collection and handling.

(a) *General.* Samples shall be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this section and the Field Manual.

(b) *Information requirements.* In order to process samples, analyze the significance of laboratory findings, and notify the railroads and employees of test results, it is necessary to obtain basic information concerning the accident/incident and any treatment administered after the accident/incident. Accordingly, the railroad representative shall complete the information required by FRA Form 6180.73 for shipping with the samples. Each employee subject to testing shall cooperate in completion of the required information on FRA Form 6180.74 for inclusion in the shipping kit and processing of the samples. The railroad representative shall request an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. One Form 6180.73 shall be forwarded in the ship-

ping kit with each group of samples. One Form 6180.74 shall be forwarded in the shipping kit for each employee who provides samples.

(c) *Shipping kit.* (1) FRA and the laboratory designated in Appendix B to this part make available for purchase a limited number of standard shipping kits for the purpose of routine handling of toxicological samples under this subpart. Whenever possible, samples shall be placed in the shipping kit prepared for shipment according to the instructions provided in the kit and the Field Manual. Specifications for kits are contained in the Field Manual.

(2) Kits may be ordered directly from the laboratory designated in Appendix B to this part.

(3) FRA maintains a limited number of kits at its field offices. A Class III railroad may utilize kits in FRA possession, rather than maintaining such kits on its property.

(d) *Shipment.* Samples shall be shipped by pre-paid air freight (or other means adequate to ensure delivery within twenty-four (24) hours) to the laboratory designated in Appendix B to this part. If courier pickup is not available at the medical facility where the samples are collected, the railroad shall promptly transport the shipping kit holding the samples to the nearest point of shipment via air freight or equivalent means.

[50 FR 31568, Aug. 2, 1985, as amended at 52 FR 10576, Apr. 2, 1987]

§ 219.207 Fatality.

(a) In the case of an employee fatality in an accident or incident described in § 219.201, body fluid and/or tissue samples shall be obtained from the remains of the employee for toxicological testing. To ensure that samples are timely collected, the railroad shall immediately notify

the appropriate local authority (such as a coroner or medical examiner) of the fatality and the requirements of this subpart, making available the shipping kit and requesting the local authority to assist in obtaining the necessary body fluid or tissue samples. The railroad shall also seek the assistance of the custodian of the remains, if a person other than the local authority.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary samples, the railroad shall immediately notify FRA by toll free telephone, Area Code 800-424-0201, providing the following information:

- (1) Date and location of the accident or incident;
- (2) Railroad;
- (3) Name of the deceased;
- (4) Name and telephone number of custodian of the remains; and
- (5) Name and telephone number of local authority contacted.

(c) A coroner, medical examiner, pathologist, Aviation Medical Examiner, or other qualified professional is authorized to remove the required body fluid and/or tissue samples from the remains on request of the railroad or FRA pursuant to this part; and, in so acting, such person is the delegate of the Administrator under Section 208 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 437) (but not the agent of the Secretary for purposes of the Federal Tort Claims Act). Such qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under these rules.

(d) The Field Manual specifies body fluid and/or tissue samples required for toxicological analysis in the case of a fatality.

§ 219.209 Reports of tests and refusals.

(a)(1) A railroad that has experienced one or more events for which samples were obtained shall provide prompt telephonic notification summarizing such events. Notification shall be provided to the Office of Safety FRA, at (202) 426-0897 (8:30 a.m. to 5:00 p.m. EST or EDT) during the Federal work week.

(2) Each telephonic report shall contain:

- (i) Name of railroad;
- (ii) Name, title and telephone number of person making the report;
- (iii) Time, date and location of the accident/incident;
- (iv) Brief summary of the circumstances of the accident/incident, including basis for testing; and
- (v) Number, names and occupations of employees tested.

(b) If the railroad is unable, as a result of non-cooperation of an employee or for any other reason, to obtain a sample and cause it to be provided to FRA as required by this section, the railroad shall make a concise narrative report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. This report shall be appended to the report of the accident/incident required to be submitted under Part 225 of this subchapter.

§ 219.211 Analysis and follow-up.

(a)(1) The laboratory designated in Appendix B to this Part undertakes prompt analysis of samples provided under this subpart, consistent with the need to develop all relevant information and produce a complete report.

(2) FRA notifies the railroad and the tested employee of the results of the toxicological analysis and permits the employee to respond in writing to the results of the test prior to preparing any final investigation report concern-

ing the accident or incident. Results of the toxicological analysis and any response from the employee are also promptly made available to the National Transportation Safety Board on request.

(b)(1) The toxicology report may contain a statement of pharmacological significance to assist FRA and other parties in understanding the data reported. No such statement may be construed as a finding of probable cause in the accident or incident.

(2) The toxicology report is a part of the report of the accident/incident and therefore subject to the limitation of Section 4 of the Accident Reports Act (45 U.S.C. 41) (prohibiting use of the report for any purpose in any action for damages).

(c)(1) It is in the public interest to ensure that any railroad disciplinary actions that may result from accidents and incidents for which testing is required under this subpart are disposed of on the basis of the most complete and reliable information available so that responsive action will be appropriate. Therefore, during the interval between an accident or incident and the date that the railroad receives notification of the results of the toxicological analysis, any provisions of collective bargaining agreements establishing maximum periods for charging employees with rule violations, or for holding an investigation, shall not be deemed to run as to any offense involving the accident or incident (*i.e.*, such periods shall be tolled).

(2) This provision shall not be construed to excuse the railroad from any obligation to timely charge an employee (or provide other actual notice) where the railroad obtains sufficient information relating to alcohol or drug use, impairment or possession or other rule violations prior to receipt of toxicological analysis.

(3) This provision does not authorize holding any employee out of service pending receipt of toxicological analysis; nor does it restrict a railroad from taking such action in an appropriate case.

(d) Each sample provided under this subpart is retained for not less than six months following the date of the accident or incident and may be made available to the National Transportation Safety Board (on request) or to a party in litigation upon service of appropriate compulsory process on the custodian of the sample at least ten (10) days prior to the return date of such process. It is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation unless a copy of the subpoena, order, or other process is contemporaneously served on the Chief Counsel, FRA, Washington, DC.

[50 FR 31568, Aug. 2, 1985, as amended at 52 FR 10576, Apr. 2, 1987]

§ 219.213 Unlawful refusals; consequences.

(a) *Disqualification.* (1) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months.

(2) The disqualification required by this paragraph shall apply with respect to employment in covered service by any railroad with notice of such disqualification.

(3) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(b) *Procedures.* (1) Prior to or upon withdrawing the employee from covered service under this section, the

railroad shall provide notice of the reason for this action and an opportunity for hearing before a presiding officer other than the charging official. This hearing may be consolidated with any other disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer shall make separate findings as to the disqualification required by this section.

(2) The hearing shall be convened within the period specified in the applicable collective bargaining agreement. In the absence of an agreement provision, the employee may demand that the hearing be convened within 10 calendar days of the suspension or, in the case of an employee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the charged employee becomes available for hearing.

(3) A post-suspension proceeding conforming to the requirements of an applicable collective bargaining agreement, together with the provisions for adjustment of disputes under Section 3 of the Railway Labor Act, shall be deemed to satisfy the procedural requirements of this paragraph.

(c) *Subject of hearing.* The hearing required by this section shall determine whether the employee refused to submit to testing, having been requested to submit, under authority of this subpart, by a representative of the railroad or an FRA representative. In determining whether a disqualification is required, the hearing official shall, as appropriate, also consider the following:

(1) Whether the railroad made a good faith determination, based on reasonable inquiry, that the accident or incident was within the mandatory testing requirements of this subpart; and

(2) In a case where a blood test was refused on the ground it would be inconsistent with the employee's health, whether such refusal was made in good faith and based on medical advice.

Subpart D—Authorization to Test for Cause

§ 219.301 Testing for reasonable cause.

(a) *Authorization.* A railroad may, under the conditions specified in this subpart, require any covered employee, as a condition of employment in covered service, to cooperate in breath or urine testing, or both, to determine compliance with § 219.101 of this part or a railroad rule implementing the requirements of § 219.101. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service). The provisions of this subpart apply only when, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section.

(b) *Reasonable cause for breath tests.* The following circumstances constitute reasonable cause for the administration of breath tests under this section:

(1) *Reasonable suspicion.* A supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol, or alcohol in combination with a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee;

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under Part 225 of this title, and a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

(3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors:

(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to movement of a train that involves —

(A) Occupancy of a block or other segment of track to which entry was not authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consist [sic] with § 218.37 of this title;

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule or operation of a switch under a train;

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes; or

(vii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

(c) *Reasonable cause for urine test —*

(1) *Accident/incident and rule violation.* Except as provided in paragraph (c)(2) of this section, each of the conditions set forth in paragraphs (b)(2) ("accident/incident") and (b)(3) ("rule violation") of this section as constituting reasonable cause for breath testing also constitutes reasonable cause with respect to urine testing.

(2) *Reasonable suspicion.* Reasonable cause also exists where a supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee, subject to the following limitations:

(i) An employee be required to submit to urine testing for reasonable suspicion only if the determination is made by at least two supervisory employees; and

(ii) If the determination to require urine testing is based upon suspicion that the employee is under the influence of or impaired by a controlled substance, at least one supervisory employee responsible for the decision to require urine testing must have received at least three (3) hours of training in the signs of drug intoxication consistent with a program of instruction on file with FRA under Part 217 of this title. Such program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of the major drug groups on the controlled substances list (narcotics, depressants, stimulants, hallucinogens, and marijuana).

(d) *Preference for breath test where alcohol suspected.* If an employee is specifically suspected only of being under the influence of or impaired by alcohol, breath testing is the preferred means of confirmation. The railroad shall conduct a breath test before requiring a urine test unless to do so would not be feasible because of unavailability of a testing device or other considerations of safety or efficiency.

(e) *Limitation for Subpart C events.* The compulsory urine testing authority conferred by this section does not apply with respect to any event subject to post-accident

toxicological testing as required by § 219.201 of this part. However, use of compulsory breath test authority is authorized in any case where breath test results can be obtained in a timely manner at the scene of the accident and conduct of such tests does not materially impede the collection of samples under Subpart C.

(f) *Time limitation.* Nothing in this section shall authorize testing of an employee after the expiration of an 8-hour period from the time of the observations or other events described in this section.

(g) *Construction.* Nothing in this subpart requires a railroad to undertake breath testing as a requisite to any disciplinary action or restricts the discretion of a railroad to proceed based solely on evidence of behavior, personal observations, or other evidence customarily relied upon in such investigations or hearings.

[50 FR 31568, Aug. 2, 1985, as amended at 50 FR 50889, Dec. 12, 1985]

§ 219.303 Breath test procedures and safeguards.

(a) Except as provided in paragraph (d) of this section, the following conditions apply to breath testing authorized by this subpart.

(1) Testing devices shall be selected from among those listed on the Conforming Products List of Evidential Breath Measurement Devices amended and published in the FEDERAL REGISTER from time to time by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation. This listing is also contained in the current Field Manual.

(2) Each device shall be properly maintained and shall be calibrated by use of a calibrating unit listed on the NHTSA Conforming Products List of Calibrating Units for Breath Alcohol Testers (as amended and published and

contained in the current Field Manual) with sufficient frequency to ensure the accuracy of the device (within plus or minus .01 percent), but not less frequently than provided in the manufacturer's instructions.

(3) Tests shall be conducted by a trained and qualified operator. The operator shall have received training on the operational principles of the particular instrument employed and practical experience in the operation of the device and use of the breath alcohol calibrating unit (reference standard). A copy of the training program shall be filed with FRA in conjunction with the filing required by § 217.11 of this title.

(4) Tests shall be conducted in accordance with procedures specified by the manufacturer of the testing device, consistent with sound technical judgment, and shall include appropriate restrictions on ambient air temperature.

(5) If an initial test is positive, the employee shall be tested again after the expiration of a period of not less than 15 minutes, in order to confirm that the test has properly measured the alcohol content of deep lung air.

(b) Because of the inherent limitations of the instrumentation, any indicated breath test result of less than .02 percent shall be deemed a negative test.

(c) In any case where a breath test is intended for use in the railroad disciplinary process and the result is positive, the employee shall be given the prompt opportunity to provide a blood sample at an independent medical facility for analysis by a competent independent laboratory. The railroad shall provide the required transportation to facilitate the blood test.

(d)(1) Under the circumstances set forth in § 219.301, a railroad may require an employee to participate in a screening test solely for the purpose of determining

whether the conduct of a test meeting the criteria of paragraph (a) of this section is indicated. If the screening test is negative within the meaning of paragraph (b) of this section, the employee shall not be required to submit to further breath testing under this subpart. If the screening test is positive, no consequence shall attach except that the employee may be removed from covered service for the period necessary to conduct a breath test meeting the criteria of paragraph (a) of this section or a urine test meeting the requirements of §§ 219.305 and 219.307 of this subpart (consistent with § 219.301(d) of this subpart).

(2) Except as provided in paragraph (d)(2)(iii) of this section, the conduct of a screening test under paragraph (d)(1) of this section does not excuse full compliance with paragraph (a) of this section with respect to any breath test procedure which is then undertaken. If a screening test is positive, the following procedures govern:

(i) An initial breath test shall be conducted meeting the criteria of paragraph (a) of this section.

(ii) If that test is positive, a second breath test shall be conducted meeting the criteria of paragraph (a) of this section.

(iii) The second test meeting the criteria of paragraph (a) of this section must be conducted at least 15 minutes after the positive screening test conducted under paragraph (d)(1) of this section. However, since a waiting period of 15 minutes is sufficient to permit the dissipation of any alcohol in the mouth, the requirement of paragraph (a)(5) of this section that there be a period of at least 15 minutes between the two tests meeting the criteria of paragraph (a) of this section does not apply.

[50 FR 31568, Aug. 2, 1985, as amended at 50 FR 38661, Sept. 24, 1985; 50 FR 45407, Oct. 31, 1985]

§ 219.305 Urine test procedures and safeguards.

(a) Urine shall be collected at an independent medical facility. Personnel of the medical facility shall supervise the collection procedure.

(b) The railroad shall establish procedures with the medical facility and the laboratory selected for testing to ensure positive identification of each sample and accurate reporting of laboratory results.

(c) A urine test procedure may include the provision of not more than two samples from the same employee.

(d) In any case where a urine test is intended for use in the railroad disciplinary process, the employee shall be given the opportunity to provide a blood sample at the independent medical facility for analysis by a competent independent laboratory.

(e) Nothing in this subpart restricts any discretion available to the railroad to request or require that an employee cooperate in additional body fluid testing.

§ 219.307 Standards for urine assays.

(a) *Laboratory standards.* A railroad employing the urine testing authority conferred by this subpart shall ensure that —

(1) Urine testing authorized by this part shall be undertaken only by an independent laboratory (or laboratories) proficient in the testing of urine for alcohol and drugs of abuse.

(2) Each such laboratory that performs a confirmatory procedure under paragraph (b) of this section shall regularly participate in an external quality control program that involves the analysis of samples submitted by a reference laboratory. Quality control samples should include actual body fluid samples previously analyzed by the

reference laboratory, and should not be limited to spiked samples. Where practicable, known samples shall be submitted to the laboratory on a blind basis (so that the source of the sample is believed to be a customer of the laboratory).

(b) *Screening and confirmation.* Each sample shall be analyzed by a method that is reliable within known tolerances. If the screening test is positive for a substance other than alcohol, a remaining portion of the same sample shall be retested by another method. The confirmation test shall utilize a scientifically-recognized method capable of providing quantitative data specific to the drug (or metabolite(s)) detected. An immunoassay (including a radio immunoassay) is not an acceptable confirmatory test for this purpose.

(c) *Laboratory reports.* (1) Reports of positive urine tests shall, at minimum, state:

- (i) The type of test conducted, both for screening and confirmation;
- (ii) The results of each test; and
- (iii) The sensitivity (cut-off point) of the methodology employed for confirmation, and (iv) any available information concerning the margin of accuracy and precision of the quantitative data reported for the confirmation test (or, in the case of alcohol, for the single test procedure). However, in the case of a negative test (either for screening or confirmation), the report shall specify only that the test was negative for the particular substance.

(2) A legible copy of the laboratory report shall promptly be made available to the employee tested.

§ 219.309 Presumption of impairment; notice

(a) If an employee's urine sample has tested positive for a controlled substance (or its metabolite(s)) in a test

authorized by this subpart and the employee was afforded and declined the opportunity to provide a blood sample, the railroad (or a board of arbitration) may, in the absence of persuasive evidence to the contrary, presume from the presence of the identified controlled substance that the employee was impaired by that controlled substance within the meaning of § 219.101 of this subpart.

(b)(1) Each railroad that utilizes the urine testing authority conferred by this subpart shall provide effective notice of the presumption created by this section to each of its covered employees. A railroad is deemed to have provided such notice if it includes a statement similar in substance to the statement set forth in paragraph (b)(2) of this section in its book of rules, timetable, special instructions, or other publication that is made available to each covered employee and with which each such employee is required to be familiar.

(2) The following statement provides the required notice:

Under Federal Railroad Administration (FRA) safety regulations, you may be required to provide a urine sample after certain accidents and incidents or at any time the company reasonably suspects that you are under the influence of, or impaired by, drugs while on duty. Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to *sixty* days before the sample is collected). As a general matter, the test cannot distinguish between recent use off the job and current impairment. However, the Federal regulations provide that if only the urine test is available, a positive finding on that test will support a presumption that you were impaired at the time the sample was taken.

You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. The blood test will provide information pertinent to current impairment. Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.

If you have used any drug off the job (other than a medication that you possessed lawfully) in the prior sixty days, it may be in your interest to provide a blood sample. If you have not made unauthorized use of any drug in the prior sixty days, you can expect that the urine test will be negative; and you may not wish to provide a blood sample.

You are not required to provide a blood sample at any time, except in the case of certain accidents and incidents subject to Federal post-accident testing requirements (49 CFR Part 219, Subpart C).

A complete copy of the Federal regulations is available for your review at _____.

(3) A railroad that has a policy that forbids off-the-job use of drugs (not involving a specific proof that the employee is under the influence of the substance or impaired by it on the job) must include in such a notice a statement concerning any additional consequences of a positive urine test.

2
No. 87-1555

Supreme Court, U.S.

FILED

MAY 16 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, et. al.,

Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OF COUNSEL:

HAROLD A. ROSS,
General Counsel
Brotherhood of Locomotive
Engineers
The Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

CLINTON J. MILLER, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

LAWRENCE M. MANN
Alper & Mann
Suite 811
400 First Street, N.W.
Washington, D. C. 20001
(202) 298-9191

W. DAVID HOLSBERY
Davis, Cowell & Bowe
100 Van Ness Avenue
San Francisco, CA 94102
(415) 626-1880

Attorneys for Respondents
Railway Labor Executives'
Association

16 pps

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iii
BRIEF	1
CONCLUSION	8
APPENDIX A	1a

QUESTION PRESENTED

Whether regulations promulgated by the Federal Railroad Administration — mandating blood and urine tests of railroad employees who are involved in certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents, and rule violations — violate the Fourth Amendment on the ground that they do not require a showing of “particularized suspicion” of drug or alcohol impairment prior to the testing.

TABLE OF AUTHORITIES

	PAGE
CASES:	
<i>American Federation of Government Employees v. Dole</i> , 670 F. Supp. 445 (D. D.C. 1987)	3
<i>American Federation of Government Employees v. Weinberger</i> , 651 F. Supp. 726 (S.D. Ga. 1986)	3
<i>Capua v. City of Plainfield</i> , 643 F. Supp. 1507 (D. N.J. 1986)	3
<i>Division 241 Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir. 1976) <i>cert. denied</i> , 429 U.S. 1029	2
<i>Feliciano v. Cleveland</i> , 661 F. Supp. 578 (N.D. Ohio 1987)	3
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1987)	7
<i>Lovvorn v. City of Chattanooga</i> , 647 F. Supp. 875 (E.D. Tenn. 1986)	3
<i>McDonell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987)	2, 3, 7
<i>Mullholland v. Army</i> , 660 F. Supp. 1565 (E.D. Va. 1987)	3
<i>National Federation of Federal Employees v. Carlucci</i> , 2 Ind. Empl. Rights 1709 (D. D.C. March 1, 1988)	3
<i>National Treasury Employees Union v. von Rabb</i> , No. 86-1879	<i>passim.</i>
<i>New Jersey v. T.L.O.</i> , 496 U.S. 325, 337 (1985)	5
<i>O'Connor v. Ortega</i> , ____ U.S. ____, 1075 S. Ct. 1492, 1499 (1987)	5
<i>PBA v. Township</i> , 672 F. Supp. 779 (D. N.J. 1987)	3

	PAGE
<i>Rostic v. McClendon</i> , 630 F. Supp. 245 (N.D. Ga. 1986)	3
<i>Rushton v. Nebraska Public Power District</i> , 653 F. Supp. 1510 (N.D. Neb. 1987)	3
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir. 1986) <i>cert. denied</i> , 107 S.Ct. 577 (Dec. 1, 1986)	6, 7
<i>Taylor v. O'Grady</i> , 669 F. Supp. 1422 (N.D. Ill. 1987)	3
<i>Transport Workers Union v. SEPTA</i> , 2 Ind. Empl. Rights 1804 (E.D. Pa. Jan. 19, 1988) ..	3
STATUTES:	
Federal Hours of Service Act (45 U.S.C. § 61-64b)	4
REGULATORY MATERIALS:	
49 C.F.R. § 219.5(d)	4
49 C.F.R. § 219.101(a) (2) (ii), .309(b) (2) ...	4
49 C.F.R. § 219.201(b)	4
49 C.F.R. § 219.203(a) (2), (3)	4
CONSTITUTIONAL PROVISIONS:	
U.S. Constitution, Fourth Amendment	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et. al.*,

v. *Petitioners,*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et. al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

On February 29, 1988, this Court granted the petition for a writ of certiorari in *National Treasury Employees Union v. von Rabb*, No. 86-1879, a case in which the constitutionality of the United States Customs Service's drug testing program is at issue. The *von Rabb* case, as the Solicitor General states in his petition in the instant case, "present[s] the same ultimate legal question" as is presented here. (Pet. at 14). And the briefing process in *von Rabb* is well underway. Against that background — and for the reasons that follow — we suggest that this Court should follow its normal practice and defer action on the certiorari petition pending the decision on the merits in *von Rabb*.

1. At the outset we fully recognize that the court of appeals disagree with each other as to the appropriate method of analysis in cases challenging the constitutionality

of a drug-testing program.¹ *Von Rabb* will afford this Court the opportunity to resolve this conflict in principle among the lower courts and to clarify the mode of analysis that should be applied in cases of this type. It is therefore *not* necessary for the Court to grant certiorari in this case in order to enable the Court to consider these important issues.

2. The Solicitor General advances two arguments in support of his request that the Court "grant plenary review in both cases, rather than hold the present case pending the disposition of *von Rabb*." (Pet. at 19). Neither argument can withstand analysis.

First, the Solicitor General argues that "there is no reason to expect that the Ninth Circuit would reach a different result on remand, regardless of how this Court decides *von Rabb*." (Pet. at 19). That *ad hominem* attack on the court below — which so far as we are aware has no support in the Ninth Circuit's response to prior demands — demeans the Solicitor General rather than, as was intended, the lower court.

Second, the Solicitor General contends that because the drug testing in this case, unlike the testing in *von Rabb*, is animated by safety concerns, "the issues presented by this case neatly complement those presented by *von Rabb*" and that by "granting review in both cases, the Court will be able to consider the requirements of the Fourth Amendment

¹ The court below expressly criticized the decisions in *von Rabb* and in *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029, because the latter "did not consider the crucial question which is the foundation of the reasonableness test, *i.e.*, whether the search is justified at its inception." (Pet. App. at 31a). And the court below likewise criticized the decision in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), because "th[at] court simply weighed the strong interest in prison security against the urinalysis which it held to be relatively less intrusive than body searches and found the intrusion into the guards' expectation of privacy to be reasonable." (Pet. App. at 31a).

against a wider and more representative backdrop of competing interests, and therefore provide better guidance to the lower courts." (Pet. at 14 and 19-20). But the fact of the matter is that this case is all but *sui generis* and thus provides a singularly inappropriate vehicle for instructing the lower courts on how to apply the general principles that will be stated in *von Rabb* to a concrete case.

Perhaps the most important factor that sets this case apart from all other cases is that the testing is *not* being performed by a public employer on public employees. Rather, the government in this case is acting in the classic role of law maker, and is compelling *private* employers to test *private* employees without regard to whether the employers view such testing as appropriate.

The Solicitor General himself has argued, in initially opposing certiorari in *von Rabb*, that "the employment context is critically important in assessing the propriety of the program" because (according to the Solicitor General) "public employees' legitimate expectations of privacy in that setting are diminished, and the government as an employer has important interests beyond ordinary law enforcement interests." (Mem. for Resp. in No. 86-1879 at 9-10). Thus this case cannot aid the Court in illuminating these "critically important" issues.²

² In contrast, the appellate court decisions in *Suscy*, *supra*, *von Rabb*, *supra*, and *McDonell*, *supra*, all involved testing of public employees, as did the district court decisions in *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *American Federation of Government Employees v. Dole*, 670 F. Supp. 445 (D. D.C. 1987); *PBA v. Township*, 672 F. Supp. 779 (D. N.J. 1987); *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510 (N.D. Neb. 1987); *American Federation of Government Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987); *Feliciana v. Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987); *Mullholland v. Army*, 660 F. Supp. 1565 (E.D. Va. 1987); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D. N.J. 1986); *Rostic v. McClendon*, 630 F. Supp. 245 (N.D. Ga. 1986); *National Federation of Federal Employees v. Carlucci*, 2 Ind. Empl. Rights 1709 (D. D.C. March 1, 1988); *Transport Workers Union v. SEPTA*, 2 Ind. Empl. Rights 1804 (E.D. Pa. Jan. 19, 1988).

In addition, the regulation at issue here contains a number of unique features which sets this case apart from other cases challenging drug testing. For example, under the regulation the class of employees subject to testing are those employees covered by the Federal Hours of Service Act (45 U.S.C. § 61-64b); this means that certain crafts (and all management employees) are excluded from testing even though some exempt employees perform the same functions as covered employees. *See* 49 C.F.R. § 219.5(d). Within the class covered, testing is required whenever a train is involved in a major accident, regardless of what caused the accident,³ and testing is required of the entire crew regardless of the role played by particular individuals (except where a railroad representative can immediately determine that a particular employee had no role in the cause of the accident), *see* 49 C.F.R. § 219.203(a) (2), (3).⁴ Although the point of the test is to uncover employee impairment that could have affected job performance, and although the regulation contains a definition of impairment with respect to alcohol levels, no similar definition (or threshold level) is established with respect to controlled substances. *See* 49 C.F.R. § 219.101(a)(2)(ii), .309(b)(2). The relevance of all of these factors would have to be considered if the Court were to grant plenary review in this case. For all these reasons, we believe this is not a useful case to attempt to further elucidate the law pertaining to drug testing.

In all events, we submit, at least this much is clear: there is no reason for the Court to attempt to decide at this time whether this case provides a "neat complement" to *von Rabb*

³ The record reveals, for example, that even when a train accident is caused by tornado-like winds, the crew is tested for drugs. (*See* Resp. App. A).

⁴ Ironically, no testing is required of highway grade crossing accidents even though a majority of all deaths on the railroads occur in such accidents. *See* 49 C.F.R. § 219.201(b).

Rabb, or whether granting review here is appropriate to "offer important direction to [the] lower courts and the government," (Pet. at 20). Those questions can best be answered after this Court renders its decision in *von Rabb*. At that time this Court will be able to assess what issues remain open after *von Rabb*, whether those issues are appropriate for an immediate decision by this Court or should instead be considered by the lower courts in light of *von Rabb*, and whether this case (or perhaps some other case which may reach the Court while *von Rabb* is *sub judice*) provides an appropriate vehicle for addressing any issues this Court believes it ought to address. Accordingly, the instant petition should be held pending the decision in *von Rabb*.

3. The Solicitor General also argues that "the decision in this case conflicts sharply with decisions in other circuits." (Pet. at 13). That argument as we noted at the outset does not address the question whether certiorari should be granted at this time or whether this case should be held pending *von Rabb*. In any event, the Solicitor General is wrong in so contending.

The Fourth Amendment proscribes unreasonable searches. As this Court reaffirmed just last Term, "[a] determination of the standard of reasonableness . . . requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *O'Connor v. Ortega*, ___ U.S. ___, 1075 S. Ct. 1492, 1499 (1987). Thus, "'what is reasonable depends on the context within which a search takes place.'" *Id.*, quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). The appellate court decisions addressing the constitutionality of various drug testing programs turn on the facts of the various cases.

For example, it is true, as the Solicitor General states, that in *Suscy, supra*, "the Seventh Circuit approved a drug and alcohol testing program for bus drivers who were involved in serious accidents." (Pet. at 17). But in that case "no medical testing . . . [wa]s required unless two supervisory employees concur[red]," *id.* at 1267, and "the record refuted the possible existence of any interpretation by the . . . supervisory personnel which would allow the administration of blood tests or urinalysis *except where there is a reasonable basis for suspicion of alcohol or drug use*," (Brief for the Chicago Transit Authority in *Suscy* at 30-31). In this case, in contrast, testing is mandatory after any accident regardless of whether "a reasonable basis for suspicion of alcohol or drug use" exists, and even though the record indicates that alcohol or drug impairment has been a factor in only a minute fraction — only .0076% (76/10,000's of 1 percent) — of train accidents or incidents from 1975 to 1984. Indeed, testing is required — and has occurred — here even where it is positively established that an accident was caused by natural forces beyond human control. (Resp. App. A).

The appellate court cases which have upheld testing without individualized suspicion are factually distinguishable from the instant case as well. The Solicitor General cites the Fifth Circuit's decision in *von Rabb*, 816 F.2d 170, as conflicting with the decision below, *see* Pet. at 15, but, as the Solicitor General also expressly acknowledges, there are a number of "fundamental differences" between this case and *von Rabb*, *see* Pet. at 18. The court below was likewise careful "to distinguish the case before us from the Third Circuit's decision in *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, 107 S.Ct. 577 (1986)," noting that *Shoemaker* involved testing of jockeys who already are subject to intensive state regulation, *see* Pet. App. at 20a-

21a.⁵ And *McDonnell, supra*, which upheld "systematic random" testing of prison guards, 809 F.2d at 1308, is distinguishable because the testing there involved public (rather than private) employees; the test results in that case were not used punitively; and the governmental interest in that case — to identify prison guards who were drug users (and not merely employees who were reporting to work under the influence of drugs) — had a far closer fit to the program than is the case here.⁶

In sum, the appellate court decisions illustrate that government-mandated drug testing varies widely from jurisdiction to jurisdiction and from case to case in terms of *e.g.*, the category of employees subject to testing; the method of selecting individuals from among that group for testing; the use that is made of the test results; and the government interests underlying the testing program. Given that fact, this area is particularly well-suited to the Court's usual

⁵ Indeed in *Shoemaker* the Third Circuit had found that [w]hen jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they do so with the knowledge that the [Racing] Commission would exercise its authority to assure public confidence in the integrity of the industry" and that the Commission "had promulgated regulations providing for warrantless searches of stables." 795 F.2d at 1142.

Shoemaker also is distinguishable from the instant case on other grounds: unlike railroad employees, the tested jockeys in *Shoemaker* could request a hearing to contest the test, the results, and the imposition of any sanctions; for a first violation the jockey was required simply to enter into a treatment program; and was not liable for any penalty until the third or subsequent violation; and the State of New Jersey agreed in *Shoemaker* not to seek criminal prosecution based on drug testing results. Railroad workers are subject to Federal criminal sanctions where tests show alcohol or drug use as the cause of a railroad accident (18 U.S.C. §§ 341-343).

⁶ Petitioner's reliance on *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), to create a conflict with the decision below is wholly misplaced; in *Jones* the court of appeals *invalidated* the drug testing program at issue there for the very reason on which the court below in the instant case heavily relied: "the tests cannot measure current drug intoxication or degree of impairment." Pet. App. 28a, *citing Jones*.

practice of grating certiorari in one case at a time, and articulating general principles which can then be applied by the lower courts to other factual patterns.

CONCLUSION

For the foregoing reasons, the Court should defer acting on the petition for a writ of certiorari until after the Court issues its decision in *von Rabb*.

Respectfully Submitted,

LAWRENCE M. MANN
Alper & Mann
Suite 811
400 First Street, N.W.
Washington, D.C. 20001

W. DAVID HOLSBERY
Davis, Cowell & Bowe
100 Van Ness Avenue,
9th Floor
San Francisco, CA 94102
Attorneys for Respondents

Of Counsel:

HAROLD A. ROSS
General Counsel
Brotherhood of Locomotive Engineers
The Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

CLINTON J. MILLER, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

APPENDIX A

March 21, 1986
ICC-243-2

John H. Riley, Administrator
Federal Railroad Administration
400 Seventh Street Southwest
Washington, D.C. 20590

Dear Mr. Riley:

I wish to file a formal protest against the St. Louis Southwestern Railway Company and its carrier officers who forced an engineer and fireman, represented by this Organization, to provide blood and urine samples and the manner in which the samples were obtained for toxicological testing under the Final Rule issued by the Federal Railroad Administration as taken from the August 2, 1985 Federal Register and in violation of Subpart C, Section 219.201 and Section 219.203 as found on pages 31571 and 31572.

I also wish to protest the ambiguous language as found in Section 219.201(c), parts 1, 2 and 3, and all of Sections 219.203 and 219.205 in the above mentioned Final Rule.

On March 11, 1986 Engineer D.R. Green and Fireman D.V. Case were called in pool freight service at Pine Bluff,

Arkansas, to operate train HOASM, engine 7780, Pine Bluff to Jonesboro, Arkansas, on duty at 1:45 p.m.

Enroute to Jonesboro, Arkansas, at approximately 8:55 p.m., the train was struck by high winds or a tornado which resulted in 27 cars of the train being derailed. This fact is undisputed.

At approximately 1:25 a.m., Trainmaster-Agent T. E. Stokes from Memphis, Tennessee, and Assistant Division Superintendent Carl Bradley from Pine Bluff, Arkansas, were at the scene of the derailment and forced the entire crew to submit to the test using the Final Rule as their authority.

The tests were not completed until about 3:15 a.m. on March 12, 1986 and the crew was allowed something to eat around 3:25 a.m. Remember, this crew's last meal would have been around 12:30 p.m. on March 11, 1986. Where is the immediate taking of the test or concern for the crew with handling such as this?

The crew was taken to a small hospital at Brinkley, Arkansas, which was not equipped to take the samples as per the rule. The Carrier had knowledge of this and had contacted the company nurse at Little Rock, Arkansas, to have her bring the kit to the hospital at Brinkley.

As the BLE General Chairman representing the engineers and firemen on this property, I had told Mr. Bradley that I was going to file a complaint the next time he forced a crew to take a test without probable cause. This is not the first such violation. I have not kept records and I cannot give an exact number of tests that have been performed on this property without probable cause.

The FRA has suggested that it may be necessary to test 150 to 200 incident in the industry. The Southern Pacific and Cotton Belt have already tested that many employees to

date. I do not know the results on the Southern Pacific, but I can assure you the percentage of positive tests are considerably less than five percent on this property. Where is the good faith determination or probable cause with these percentages?

The abuse of the testing practices and constant harassment of the employees on this property constitutes flagrant violations of due process and must be challenged. When the FRA writes rules such as this, they leave this door wide open for the flagrant repeated violations, which create nothing but blatant harassment for our members.

If the FRA is going to force these rules on the employees, they must be charged with the responsibility of enforcing the rules. It would appear at this time that they either refuse this responsibility or lack the ability to do so.

When we have an incident caused by an act of God and have the crew handled in this manner, it clearly demonstrates the Carrier's continual harassment and now they have the FRA rules to hide behind.

There is no question as to the results of the tests that were performed in this incident. Regardless of the test results, we declare the samples invalid because of the procedure used in taking the samples, which were in violation of the procedures prescribed under the Final Rule.

We respectfully request a thorough investigation into the incident and the Final Rule to assure that similar incidents will not be repeated in the future.

Respectfully,

D. E. Thompson

1
No. 87-1555

Supreme Court, U.S.

FILED

MAY 23 1988

ROSEMARY SPANGL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

**JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS**

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 Pp

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Division 241 Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976)	4, 5
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1987)	5
<i>McDonell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987)	4, 5
<i>Rushton v. Nebraska Public Power Dist.</i> , No. 87-1441 (8th Cir. Apr. 14, 1988)	5
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986)	5
Constitution:	
U.S. Const. Amend. IV	5, 6
Miscellaneous:	
53 Fed. Reg. 16640 (1988)	6

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In our petition for a writ of certiorari, we offered three reasons why further review of the court of appeals' decision is warranted and why plenary consideration of the case, in addition to *National Treasury Employees Union v. von Raab*, No. 86-1879, is desirable. First, as the court below acknowledged (Pet. App. 30a), the decision in this case sharply conflicts with decisions in other circuits. Second, although this case and the *von Raab* case present the same ultimate legal question, they also differ in important respects and therefore shed light on different but equally significant aspects of drug and alcohol testing in general. Finally, the decision below is wrong, overstating the nature of the employee privacy interests and understating the competing safety interests at stake.

Respondents do not take serious issue with any of those propositions. They acknowledge at the outset (Br. 1-2 (footnote omitted)) that "the court [*sic*] of appeals disagree

with each other as to the appropriate method of analysis in cases challenging the constitutionality of a drug-testing program." Moreover, while respondents suggest that review in this case should await a decision in *von Raab*, they apparently agree with us (see Br. 3, 6) that the two cases involve significantly different drug-testing programs that are designed to promote significantly different goals. And finally, respondents make no argument at all as to why the decision below is correct. Indeed, while respondents style their response as a "brief in opposition," they do not really oppose certiorari at all; they simply seek to defer a grant of certiorari until a decision is rendered in *von Raab*. Respondents offer no persuasive reason for adopting that course of action.

1. Respondents first dispute (Br. 2) our contention that "there is no reason to expect that the Ninth Circuit would reach a different result on remand, regardless of how this Court decides *von Raab*" (Pet. 19). Respondents apparently read those remarks as a suggestion that the Ninth Circuit would *ignore* this Court's decision in *von Raab*; such a reading would tend to explain respondents' otherwise bewildering suggestion that we advanced an "*ad hominem* attack on the court below" that "demeans the Solicitor General rather than, as was intended, the lower court" (Br. 2). Respondents' quotation from our petition, however, elides the first half of the sentence (Pet. 18-19). There, we explained that the *reason* the Ninth Circuit might adhere to its decision on remand, regardless of *von Raab*, is "because of * * * differences" between the two cases and "because of the approach" taken by the court below. Respondents do not contest—and, elsewhere in their brief (see Br. 3, 6), even seem to share—our assessment that the decisions in this case and in *von Raab*, while addressing the same broad principles, differ in important respects in the nature of the competing interests involved.

2. Although they contend that a decision in *von Raab* will "clarify the mode of analysis that should be applied in cases of this type" (Br. 2), respondents also argue, somewhat inconsistently, that the present case is actually "*sui generis*" (Br. 3) and thus would not, as we have contended (Pet. 17-20), complement the issues already before the Court in *von Raab*. Respondents offer two unpersuasive reasons for that conclusion.

a. They first note that the present case involves a private employer and private employees and not, as in most other reported drug-testing cases, public employers and employees; respondents therefore find this case to be "a singularly inappropriate vehicle for instructing * * * lower courts" (Br. 3). Pressing the point, respondents cite (*ibid.* (citation omitted)) our brief in opposition in *von Raab*, in which we contended that " 'the employment context is critically important in assessing the propriety of the program' " and that " 'public employees' legitimate expectations of privacy in that setting are diminished, and the government as an employer has important interests beyond ordinary law enforcement interests.' " But respondents miss the point of our remarks. The very fact that drug-testing is part of an *employment* relationship—even if not a *public* employment relationship—reduces the expectation of privacy that an employee might enjoy in other contexts. That is why we said in *von Raab* that " 'the employment context is critically important.' " The drug-testing program in this case, of course, is part of an employment relationship and is operated for reasonable employment-related purposes.¹

¹ We freely acknowledge that, in some contexts, a *public* employee's expectation of privacy may be less substantial than that of a similarly situated private employee. But that does not negate the fact that the *employment context*—whether public or private—is independently crucial to evaluating the expectation of privacy.

b. Respondents also characterize this case as "*sui generis*" because it "contains a number of unique features" that would "have to be considered if the Court were to grant plenary review in this case" (Br. 4). That is doubtless true; every case "contains a number of unique features." Respondents do not dispute, however, the important respects in which this case is *not* unique. Like many other cases in the lower courts, this case involves a drug-testing program justified principally by safety concerns (an issue not significantly presented in *von Raab*). And like many other cases in the lower courts, this case involves a drug-testing program that relies on technology that cannot discern on-the-job impairment (a limitation that is not a significant factor in *von Raab*). Respondents offer no reason why those important common features do not make this case an appropriate vehicle—in ways *von Raab* is not—for deciding issues of considerable and recurring importance in drug-testing cases in the lower courts.

3. Finally, respondents contend (Br. 5-7) that the court of appeals' decision does not conflict with decisions in other circuits. That contention is hard to reconcile with respondents' earlier concession (Br. 1-2 (footnote omitted)) that they "fully recognize that the court [*sic*] of appeals disagree with each other as to the appropriate method of analysis in cases challenging the constitutionality of a drug-testing program." Equally important, respondents' claim cannot be squared with the court of appeals' own recognition that its decision "may be seen as conflicting with decisions of other circuits" (Pet. App. 30a). Indeed, as respondents themselves observe (Br. 2 n.1), the court below "expressly criticized" the decisions in *von Raab* and in *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976), and "likewise criticized" the decision in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987).

In any event, respondents' effort to identify significant factual distinctions among the various circuit court decisions is unavailing. The Seventh Circuit did *not* base its approval of the drug-testing program in *Suscy* on the presence of reasonable suspicion; indeed, the program at issue there, like the one in the present case, expressly permitted drug testing of transit workers when they were *either* suspected of being impaired *or*, in the absence of individualized suspicion, when they were " 'directly involved in any serious accident such as a collision of trains' " (538 F.2d at 1266 (citation omitted)). Similarly, while the court below, as respondents observe (Br. 6), distinguished this case from the Third Circuit's decision in *Shoemaker v. Handel*, 795 F.2d 1136, cert. denied, 479 U.S. 986 (1986), respondents do not dispute our contention (Pet. 20-21) that the court's distinction overlooked the regulated nature of railroad work and the correspondingly reduced expectation of privacy among railroad employees.² And respondents' purported distinction (Br. 7 & n.6) of the Eighth Circuit's decision in *McDonell v. Hunter*, *supra*, and the District of Columbia Circuit's decision in *Jones v. McKenzie*, 833 F.2d 335 (1987), ignores the fact that both of those courts, in sharp contrast to the court below, held that

² The Eighth Circuit has also recently rejected the Ninth Circuit's decision in this case on that basis. *Rushton v. Nebraska Public Power Dist.*, No. 87-1441 (Apr. 14, 1988). In upholding a drug-testing program for employees at a state nuclear power plant, the Eighth Circuit found that the "nuclear industry is heavily regulated" and that, once inside the plant, employees "are subject to observation" (slip op. 9). The court of appeals accordingly held that drug tests, conducted without particularized suspicion, are reasonable under the Fourth Amendment. Although it suggested that the Ninth Circuit's decision in this case may be distinguishable (*id.* at 10), the court also stated (*ibid.*) that, to the extent that the decisions were at odds, it disagreed with the Ninth Circuit.

under the Fourth Amendment drug tests may be conducted in the absence of a particularized suspicion of drug use.³

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

MAY 1988

³ The Federal Railroad Administration has recently issued a Notice of Proposed Rulemaking, proposing a rule that would supplement the current drug-testing program with a system of random drug tests. See 53 Fed. Reg. 16640 (1988). The proposed rule, however, would not displace the current drug-testing program and thus has no bearing on this litigation.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF AMICI CURIAE FOR
NATIONAL RAILROAD PASSENGER CORPORATION
AND ASSOCIATION OF AMERICAN RAILROADS
IN SUPPORT OF THE PETITION**

Of Counsel

HAROLD R. HENDERSON
Vice President—Law
FREDERICK C. OHLY
Associate General Counsel
NATIONAL RAILROAD PASSENGER
CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001

J. THOMAS TIDD
Vice President and General Counsel
ASSOCIATION OF AMERICAN
RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001

ERWIN N. GRISWOLD
Counsel of Record
SARAH W. PAYNE
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3898
Counsel for the Amici

QUESTION PRESENTED

Whether an agency charged with maintaining railroad safety and investigating railroad accidents can, consistently with the Fourth Amendment, establish by regulation a program under which operating railroad employees are subject to warrantless alcohol and drug tests following their involvement in significant accidents or "human factor" rule violations?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF THE AMICI	1
STATEMENT	4
The Proceedings Below	7
REASONS FOR GRANTING THE WRIT	8
I. THIS CASE INVOLVES AN IMPORTANT FEDERAL INITIATIVE IN A TOTALLY UNSETTLED AREA OF THE LAW	8
A. The Importance of the Case	8
B. The Conflicting Decisions in Lower Courts....	9
II. THIS COURT'S GRANT OF CERTIORARI IN <i>NATIONAL TREASURY EMPLOYEES UNION v. VON RAAB</i> , No. 86-1879, WILL NOT RESOLVE THE ISSUES RAISED BY THE PETITION	10
III. THE FRA'S REGULATIONS ESTABLISH SUFFICIENT CAUSE TO SATISFY THE FOURTH AMENDMENT'S "REASONABLE- NESS" REQUIREMENT	12
A. The Regulations Sharply Limit Any Exer- cise of Discretion by Railroad Personnel Who Implement the Testing Program.....	12
B. The Regulations Are Tailored to Avoid Any Undue Intrusions Upon Privacy	14
C. Cause Requirements Incorporated Into the Regulations Satisfy the Fourth Amendment in the Circumstances of This Case	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:

	Page
<i>Amalgamated Transit Union v. Sunline Transit Agency</i> , 663 F. Supp. 1560 (C.D. Cal. 1987)....	9
<i>Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976)	10
<i>Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.</i> , 838 F.2d 1087 (9th Cir. 1988), petition for cert. filed, No. 87-1631 (April 1, 1988)	4
<i>Capua v. Plainfield</i> , 643 F. Supp. 1507 (D.N.J. 1986)	9, 12
<i>Colonnade Catering Corp. v. United States</i> , 397 U.S. 72 (1970)	15
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	13
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981)	15
<i>Feliciano v. Cleveland</i> , 661 F. Supp. 578 (N.D. Ohio 1987)	9
<i>Lovvorn v. Chattanooga</i> , 647 F. Supp. 875 (E.D. Tenn. 1986)	9
<i>Michigan v. Clifford</i> , 464 U.S. 287 (1984)	13
<i>Michigan v. Tyler</i> , 436 U.S. 499 (1977)	13
<i>National Treasury Employees Union v. Von Raab</i> , 816 F.2d 170 (5th Cir.), petition for cert. filed, No. 86-1879 (May 27, 1987)	10, 11, 12
<i>New York v. Burger</i> , 107 S. Ct. 2636 (1987)	15, 16, 18
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir.), cert. denied, 107 S.Ct. 577 (1986)	9, 17
<i>United States v. Biswell</i> , 406 U.S. 311 (1972)	15
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1983)	15
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980) ..	13
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983)	15
<i>Wyman v. James</i> , 400 U.S. 309 (1971)	14

STATUTES:

Railway Labor Act, 45 U.S.C. §§ 151 <i>et seq.</i>	16
Federal Railroad Safety Act, 45 U.S.C. §§ 431 <i>et seq.</i>	16

TABLE OF AUTHORITIES—Continued

REGULATORY MATERIALS:

	Page
49 C.F.R. Part 217 (1987)	17
49 C.F.R. Part 218 (1987)	17
49 C.F.R. Part 19, Subpart F (1987)	17
49 C.F.R. §§ 219.1 <i>et seq.</i> (1987)	passim
49 C.F.R. Part 220 (1987)	17
48 Fed. Reg. 30,723 (1983)	4
49 Fed. Reg. 24,252 (1984)	5, 7
50 Fed. Reg. 31,508 (1985)	passim

MISCELLANEOUS:

<i>Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Committee on Commerce, Science and Transportation, 100th Cong., 2d Sess. 50-51 (1988) (Statement of John H. Riley, FRA Administrator)</i>	2
--	---

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,
v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF AMICI CURIAE FOR
NATIONAL RAILROAD PASSENGER CORPORATION
AND ASSOCIATION OF AMERICAN RAILROADS
IN SUPPORT OF THE PETITION**

This brief is filed on behalf of the National Railroad Passenger Corporation and the Association of American Railroads, as amici curiae, in support of the petition for certiorari.¹

INTERESTS OF THE AMICI

The National Railroad Passenger Corporation ("Amtrak") manages the country's intercity rail passenger system. Amtrak operates trains in 43 states over a 24,000

¹ Consents from counsel for the parties have been filed with the Clerk of this Court.

mile network of track (most of which is owned and also used by freight railroads) with a workforce of some 22,000 employees. The Association of American Railroads ("AAR") is a trade association representing the nation's freight railroads, and has long studied and represented the industry on such matters as railroad operations, maintenance, and safety.

The Ninth Circuit's decision below—invalidating Federal Railroad Administration regulations which established a carefully focused program of alcohol and drug testing of railroad employees involved in certain serious accidents and human factor rule violations—is of grave concern to Amtrak and AAR. For more than two years, the present litigation has chilled implementation of the regulations, and by extension, slowed efforts by some railroads to promote additional measures to further curtail alcohol and drug use within the industry. Yet alcohol and drug-related accidents continue to occur, some involving passenger fatalities, many involving employee fatalities, and some imperiling entire communities by release of hazardous cargos.

The most tragic accident in recent memory, which resulted in 16 deaths and scores of injuries, occurred near Chase, Maryland on January 4, 1987. The two crewmen responsible for that accident tested positive for marijuana and one had traces of the hallucinogenic drug PCP in his urine. Significantly, the involvement of drugs in that accident would have gone undetected were it not for the post-accident testing performed pursuant to the FRA regulations. Since January 1987 alone, there have been 41 railroad accidents, involving 29 deaths, 341 injuries, and \$28 million in property damages, in which one or more of the train operators were impaired by alcohol or drugs. Over five percent of employees undergoing post-accident testing tested positive.² Derailments of trains

² *Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Committee on Com-*

in at least five states during 1987 caused evacuation of over 22,200 persons from their homes.³

As responsible employers, passenger carriers, and industry spokesmen, amici believe that all reasonable steps must be taken to prevent these tragedies. The amici recognize that—despite useful innovations such as employee assistance programs (which amici wholeheartedly support)—there are practical limits to what railroad management can do, without toxicological testing, to address the substance abuse problem. By necessity, railroad employees operate in far-flung locations and around the clock. Visual monitoring of employee performance is not always possible, at least for major railroads; and impairment, especially when drug use is involved, is often difficult to identify except in the most egregious cases.

Each railroad has for many years had rules prohibiting employees' use of or impairment by alcohol in connection with performance of their jobs. In recent years, those rules have generally been modified to include specifically a similar prohibition with respect to drugs. Railroads have used a variety of methods for monitoring employee conduct and enforcing the rules, with increasing emphasis on certain forms of toxicological testing. In adopting its regulations after a rulemaking proceeding of more than two years' duration, which was itself preceded by several years of analysis and discussion, the FRA determined that industry-wide toxicological testing is essential to deal with the current substance abuse problem.

The FRA regulations provide a significant tool for identifying those employees who use alcohol or drugs while performing functions associated with train opera-

merce, Science and Transportation, 100th Cong., 2d Sess. at 50-51 (1988) (Statement of John H. Riley, FRA Administrator).

³ See Associated Press, December 13, 1987, July 22, 1987, May 6, 1987; United Press International, February 2, 1987, January 6, 1987.

tions. By holding these regulations invalid in this case, the Ninth Circuit has seriously impaired efforts to prevent senseless fatalities, injuries, and property damage in the railroad industry.⁴ Amici thus have a direct and immediate interest in urging the Court to hear this case.

STATEMENT

Acting pursuant to its statutory role of overseeing railroad safety, the Federal Railroad Administration ("FRA"), after thorough investigation,⁵ determined that alcohol and drug use by railroad personnel is a proven cause of a significant number of recent, avoidable railroad accidents and fatalities.⁶ The agency also reasonably

⁴ Railroad companies operating in the Ninth Circuit find themselves particularly disabled from addressing substance abuse by employees. Not only has the Court of Appeals there invalidated the FRA's regulations in the opinion presently at issue, it has also, in an opinion totally at odds with a prior Eighth Circuit decision, held that its Fourth Amendment analysis is determinative of the *contractual expectations* of parties to *pre-existing* collective bargaining agreements, effectively prohibiting railroads from instituting substance abuse programs independently. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed*, No. 87-1631 (April 1, 1988). That case involves the same critical public safety concerns raised here, but presents distinct legal issues regarding implementation of drug use testing by a private employer in the context of a collective bargaining relationship.

⁵ The FRA began its study of alcohol use by railroad employees in 1975. See 48 Fed. Reg. 30,723, 30,724 (July 5, 1983). After developing recommendations for action by the railroads, the FRA determined that such steps, while useful, could not solve the problem alone. *Id.*, at 30,725, 30,731. The notice and comment proceeding which culminated in promulgation of the regulations at issue lasted over two years, and involved extensive hearings and industry-wide participation. The FRA considered all comments and, in response, made numerous significant revisions in the regulations it had initially proposed.

⁶ FRA concluded from its investigation that:

the documented problem is serious enough to mandate action. Based on an intensive review of FRA and NTSB [National

believed that available statistics substantially understated the extent of the problem; autopsies, although performed only intermittently, showed a far greater incidence of alcohol and drug ingestion by railroad personnel killed in workplace accidents than would otherwise have been suspected, and FRA and NTSB investigate only a small percentage of all train accidents. 49 Fed. Reg. 24,252, 24,265 (June 12, 1984).

Although the problem obviously required FRA attention, no easy solution presented itself. The FRA's research revealed that employees who imbibe low⁷ to moderate amounts of alcohol most frequently do not exhibit any easily detectable signs of impaired performance. In addition, "alcoholics and other habituated drinkers may be able to achieve elevated [blood alcohol content levels] (even in excess of .30 percent) without showing outward signs that would be evident to a person with limited training." 50 Fed. Reg. at 31,526 (August 2, 1985).⁸

Transportation Safety Board] accident reports and reports filed by the railroads with FRA, FRA has identified 34 fatalities, 66 injuries and over \$28 million in property damages (in 1983 dollars) that resulted from the errors of alcohol and drug-impaired employees in 45 train accidents and train incidents during the period 1975 through 1983.

49 Fed. Reg. 24,252, 24,254.

⁷ Alcohol, even in lesser amounts, is known to affect "choice reaction time" (i.e., human response time in "divided attention situations of the kind experienced by operators of transportation vehicles"). 50 Fed. Reg. 31,508, 31,536. Small quantities of alcohol are also thought to increase by more than five times the likelihood that train operators will be lulled to sleep by the rhythmic rocking of the cars during long, routine night trips. *Id.*

⁸ The FRA noted research indicating that social drinkers, bartenders, and even some police officers cannot accurately judge levels of alcohol intoxication. 50 Fed. Reg. at 31,526 (citing Langenbucher, J.S. and Nathan, P.E., *Psychology, Public Policy and Evidence for Alcohol Intoxication*, *American Psychologist*, 38[10]: 1070-1077, 1983). The FRA further noted that "many emergency rooms rou-

Detection of drug-related impairment is even more difficult: "[m]any drugs of abuse produce effects much more subtle or complex (and sometimes more pernicious) than alcohol." 50 Fed. Reg. at 31,527.

Because it would achieve the agency's desired objectives of insuring public safety by (1) increasing industry awareness of the correlation between accidents and alcohol or drug use, (2) deterring on-the-job substance abuse, and (3) obtaining needed information on which to base further regulatory efforts, *see, e.g.*, 50 Fed. Reg. at 31,540, the FRA ultimately concluded that an alcohol and drug testing program covering a limited number of railroad employees actually responsible for the movement of rail traffic would be the most effective first step. The regulations, applying almost exclusively to those railroad employees whom Congress determined in the Hours of Service Act to be performing service connected with the movement of trains, *see* 49 C.F.R. § 219.3(d), (e), were promulgated on August 2, 1985.

Part C of the regulations mandates prompt testing (by medical analysis of blood and urine samples) of railroad employees involved in any of the following: (i) any train accident resulting in a fatality, a release of a hazardous material accompanied by an evacuation or a reportable injury, or damage to railroad property of \$500,000 or more; (ii) a collision resulting in a reportable injury or damage to railroad property of \$50,000 or more; or (iii) a "train incident that involves a fatality to any on-duty railroad employee." 49 C.F.R. § 219.201(a).

Part D of the regulations permits, but does not require, prompt testing (by analysis of urine and breath samples) of (i) all employees involved in reportable accidents or incidents who are reasonably suspected by

tinely test blood samples for ethanol precisely because they can miss even high blood alcohol levels during triage." 50 Fed. Reg. at 31,526.

supervisors to have contributed to the cause or severity of those accidents or incidents; and (ii) all employees directly involved in specific human error "operating rule violations. 49 C.F.R. § 219.301."⁹

Noting that it had "no jurisdiction to terminate employment relationships," 50 Fed. Reg. at 31,546, the FRA generally left the disciplinary consequences of positive test results to be settled by the employing railroad. It imposed as the only *federal* sanction a requirement that employees refusing to provide blood and urine samples under the mandatory (Part C) testing program be disqualified for nine months from Hours of Service work. 49 C.F.R. § 219.213. The agency expressly forbade physical coercion or "any other deprivation of liberty." 49 C.F.R. § 219.11(e). Railroad employees employed on and after February 10, 1986 were "deemed to have consented to" the testing program. 49 C.F.R. § 219.11(a).

The Railway Labor Executives' Association and certain labor organizations brought this action to enjoin the FRA's drug testing program, relying on, in relevant part, the Fourth Amendment.

The Proceedings Below

The District Court for the Northern District of California upheld the constitutionality of the challenged regulations, stating that "there are no factual issues." The

⁹ The FRA notice announcing promulgation of the regulations describes in layman's terms the operating violations that are covered, and explains that each of these particular violations is "an objective event and a clear indication of a material deviation from safe practice suggesting the real possibility that the employee is not fit." 50 Fed. Reg. at 31,553.

¹⁰ Part D also permits testing of employees whom supervisors reasonably believe, on the basis of personal observation, to be under the influence of alcohol or drugs. 49 C.F.R. § 219.301(b)(1), (c)(2). The court below upheld these provisions, and they are not further discussed here.

court noted that the regulations serve compelling governmental purposes:

The government certainly has a valid public and governmental interest in the promotion of safety and railway safety, safety for employees, and safety for the general public that is involved with the transportation. It's also obvious from the length of time and the detail in which the regulations have gone that the government has made a sincere attempt to gath[er] together information and do some balancing of interests on its own.

Appendix B to Petition, at 52a.

A divided panel of the Court of Appeals for the Ninth Circuit reversed, and the Secretary of Transportation seeks review here.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN IMPORTANT FEDERAL INITIATIVE IN A TOTALLY UNSETTLED AREA OF THE LAW.

A. The Importance of the Case.

Few would contend that the risk to public safety posed by railroad employees who consume alcohol or drugs while operating trains is one society should tolerate. Every train is an instrumentality of potentially massive destructive power, not only from collisions, but by reason of the nature of the cargo carried, such as toxic chemicals or other hazardous materials. Recent history has shown that some railroad employees undertake operational responsibilities with judgment or senses clouded by alcohol or drugs, thus endangering not only themselves, but the lives and property of fellow employees, rail passengers, motorists, railroad companies, and abutting communities. In the interests of public safety, such employees should be identified and their problems confronted.

Because of the compelling public interest in implementing the FRA's carefully-conceived program to address this need, a grant of the petition is badly needed so that the constitutional problems involved can be fully considered and resolved on a national basis. A refusal by the Court to hear this case will permit the decision below to stand as a bar to institution of governmental alcohol and drug testing programs in other industries—e.g., aviation, trucking, nuclear power, air traffic control—in which substance abuse by employees might well have equally lethal consequences.

B. The Conflicting Decisions in Lower Courts.

The decision below likewise merits review here because of the conflict-ridden state of the decisions in lower courts concerning the constitutionality of alcohol and drug testing. The decision below and others hold "individualized suspicion" to be an absolute prerequisite to such testing, see, e.g., *Capua v. Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); but other courts have upheld random or mass testing of employees. See *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986).¹¹ Still other decisions mandate individualized suspicion on their facts, while suggesting the possibility that governmental formulation of a generalized policy regarding candidates for tests might be sufficient to satisfy the Fourth Amendment. *Amalgamated Transit Union v. Sunline Transit Agency*, 663 F. Supp. 1560, 1568 n.4 (C.D. Cal. 1987); *Feliciano v. Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987); *Lovvorn v. Chattanooga*, 647 F. Supp. 875, 883 (E.D. Tenn. 1986). Also notable is a case with facts almost identical to the present case, where post-accident

¹¹ Indeed, the *Shoemaker* court, in a decision directly inconsistent with the opinion later rendered in this case by the Court below, held that the "administrative search" doctrine applies in highly regulated industries to permit drug testing of employees (and not just searches of business premises) without requiring either individualized suspicion or procurement of warrants.

testing was held valid. *Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976) (because of a transit authority's "paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs," transit workers "can have no reasonable expectation of privacy with regard to submitting to blood and urine tests"), *cert. denied*, 429 U.S. 1029 (1976). These conflicts demonstrate that the district and appellate courts badly need guidance from this Court in working out the constitutional implications of alcohol and drug testing.

II. THIS COURT'S GRANT OF CERTIORARI IN NATIONAL TREASURY EMPLOYEES v. VON RAAB, No. 86-1879, WILL NOT RESOLVE THE ISSUES RAISED BY THE PETITION.

Although the *Von Raab* case now awaiting hearing by this Court involves the constitutionality of employee drug testing, that case does not raise the important issues which are at the heart of the present petition. This case involves three critical factors not present in *Von Raab*: a compelling government interest in public safety; a cause requirement embedded in objective regulatory standards; and testing of employees, rather than job applicants only.

Von Raab upheld Customs Service regulations that require urine testing of applicants for employment in positions involving either interdiction of illicit drugs, carrying of firearms, or access to classified information. The purpose of the regulations—safeguarding the integrity of, and public confidence in, an agency having daily contact with criminals and illicit drugs—is primarily important to the law enforcement community. The FRA's regulations, in contrast, serve to protect the public from the imminent threat to safety known to be posed by train operators who are under the influence of alcohol or drugs. These compelling interests of public safety are shared by every common carrier, and by public utilities, certain

allied industries, and other governmental departments as well. The present case, if heard by the Court, will provide concrete guidance regarding the reasonableness under the Fourth Amendment of public-safety based alcohol and drug testing programs. *Von Raab* does not involve public safety, and it will provide no such guidance. A decision in the *Von Raab* case, followed by a summary reversal and remand of this case, would be of little help in applying the Fourth Amendment balancing test here. The question would still have to be decided here eventually, and, in the public interest, and in the interest of judicial economy, it should be decided presently and in this case.

In *Von Raab*, the Customs Service expressly denied that any drug abuse existed among its employees, historically or currently. *Von Raab* thus involves administration of tests without any reason to suspect that the results may be positive. Whatever the merits of such a program, the FRA regulations are quite different. The FRA regulations contain an implied "cause" requirement: employees are only tested following involvement in serious accidents or rule violations which, based on experience, the FRA has determined to be either difficult to investigate, or historically attributable to operator error. *See, e.g.*, 50 Fed. Reg. at 31,542. In the context of the FRA's findings that an alcohol and drug problem exists in the railroad industry, and that this problem has caused a significant number of serious accidents, the FRA's standards express sufficient grounds for a constitutionally adequate suspicion that the employees tested will be found to have been under the influence of alcohol or drugs. This implicit cause determination—not present in the *Von Raab* case—satisfies the Fourth Amendment's "reasonableness" requirement. *Von Raab* will not advise lower courts regarding the sufficiency of cause requirements imposed through objective administrative standards; nor will it illuminate the relevance of this Court's precedents to such a concept.

Finally, *Von Raab* involves testing of job applicants, while this case involves testing of current employees. Lower courts—indeed the *Von Raab* court itself—consider this distinction to be significant for Fourth Amendment purposes. See, e.g., *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 178 (5th Cir. 1987); *Capua v. Plainfield*, 643 F. Supp. at 1519. To the extent that courts would still be left without guidance in determining whether the privacy expectations of applicants for employment are different from those of employees, *Von Raab* will not resolve this case.

Though this case is in the same area as *Von Raab*, the issues involved are quite different. The questions involved here are of great importance, and merit a decision by this Court which is specifically applicable to this case.

III. THE FRA'S REGULATIONS ESTABLISH SUFFICIENT CAUSE TO SATISFY THE FOURTH AMENDMENT'S "REASONABLENESS" REQUIREMENT.

A. The Regulations Sharply Limit Any Exercise of Discretion by Railroad Personnel Who Implement the Testing Program.

The FRA's regulations are carefully drawn to protect Fourth Amendment interests. Searches are only permitted where events occur which justify a reasonable supposition of human error that may have been caused by alcohol or drug impairment¹²—thus bringing into

¹² Note that the FRA expressly excluded from its description of such events rail/highway grade crossing collisions. 49 C.F.R. § 219.201(b). The agency observed that in most cases, such collisions are not caused by errors on the part of railroad personnel. See 50 Fed. Reg. at 31,543.

play the regulatory findings that a significant number of railroad accidents are alcohol or drug-related.¹³

The FRA has carefully defined these events in almost totally objective terms: practically the *only* discretion railroads have in designating employees for testing under the standards is determining whether property damage is extensive enough to meet the criteria. Even as to the latter point, the regulations explicitly require that a "good faith" estimate be made, 49 C.F.R. § 219.203(c), and—recognizing that railroad personnel are the only persons available at the scene to implement the testing program—specify that such estimates pertain only to damage to railroad property. See 49 C.F.R. § 219.201 (a)(1)(iii), (a)(2)(ii). Railroads failing to comply with any part of the regulations are subject to civil penalties. 49 C.F.R. § 219.9.

¹³ Compare *Delaware v. Prouse*, 440 U.S. 648, 659 (1979):

The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained.

Compare also *United States v. Mendenhall*, 446 U.S. 544, 565 (1980) (Powell, J., concurring) (drug courier profile, applied by experienced officer, was a "well-planned, and effective, Federal law enforcement program" satisfying "reasonable and articulable suspicion of criminal activity" standard).

Moreover, since the regulations require testing of employees based on involvement in serious accidents which the FRA has determined to be of great public interest and difficult to investigate, the need to preserve evidence for the safety investigation is an "exigent circumstance" justifying the testing under the Fourth Amendment's "reasonableness" requirement. *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1977).

B. The Regulations Are Tailored to Avoid Any Undue Intrusions Upon Privacy.

The regulations require that all blood and urine samples be collected at independent medical facilities by medical personnel or technicians. 49 C.F.R. §§ 219.203(c), 219.305(a). They do not authorize that samples be tested for any characteristic other than alcohol and drug use, nor do they authorize release to railroads of medical information (other than the presence in body fluids of alcohol or drugs or their metabolites) derived from the tests. Except for an implied requirement that the tests be administered in such a way as to provide reliable results, the regulations do not sanction intrusions upon employee privacy during collection of urine samples. They expressly prohibit forced administration of tests. The regulations require that employees refusing to undergo Part C testing be disqualified for nine months from Hours of Service functions, but otherwise leave disciplinary decisions to the railroads. The latter decisions will be made in the context of the procedures and requirements which Congress and the courts have deemed appropriate to protect the employment interests of railroad labor.

In these circumstances, the privacy interests of tested employees are not impaired in a constitutional sense. Case law considering whether "consent" to a search conducted by law enforcement personnel is voluntary and non-coerced has no application to the only governmental intrusion here—the requirement that employees, who are under no physical compulsion, decide whether they will provide blood, urine, or breath samples, or whether they would rather be disqualified from service for nine months and undergo such further disciplinary proceedings as their employers may deem necessary and not inconsistent with legal obligations. *Compare Wyman v. James*, 400 U.S. 309, 317 (1971) (where visitation by

social worker "in itself is not forced or compelled, [and] the beneficiary's denial of permission is not a criminal act," no Fourth Amendment search occurs, despite the fact that the visit may have "both rehabilitative and investigative" purposes, and that benefits cease upon refusal to permit the visit). Nor do the regulations implicate privacy interests in the "personal information contained in body fluids," since the only "personal information" divulged is alcohol and drug use—information in which, for purposes of safety investigations, employees have no reasonable expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109, 122-24 (1983). *See also United States v. Villamonte-Marquez*, 462 U.S. 579, 591-92 (1983).¹⁴

C. Cause Requirements Incorporated Into the Regulations Satisfy the Fourth Amendment in the Circumstances of This Case.

The FRA's objectively-expressed cause requirement is fully consistent with the spirit and the letter of the Fourth Amendment. The regulations fit easily within the guidance of this Court's "administrative search" cases. Such cases hold that warrantless searches, unsupported by traditional probable cause determinations, of premises of heavily regulated businesses are reasonable when performed without force and pursuant to appropriate standards. *See New York v. Burger*, 107 S. Ct. 2636 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970). These cases, which emphasize the need for warrantless searches in order to meet the reasonable needs of public concern, turn on the fact that proprietors in such indus-

¹⁴ Note that most, if not all, railroads have for years enforced "Rule G," an industry safety rule which prohibits railroad employees from using alcohol or narcotics while on duty, from possessing these substances while on company property, and from reporting for duty while under the influence of alcohol or drugs.

tries are aware of the extensive regulation to which they are subject and accordingly have no reasonable expectation of privacy.

Under these cases, the doctrine applies, despite the absence of individualized suspicion, where (1) "there [is] a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) warrantless inspections are necessary to the regulatory scheme; and (3) the inspection program, "in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant" (i.e., the regulations must advise that the search is being made pursuant to the law and in accordance with a properly defined scope, and must limit the discretion of the inspecting officers). *New York v. Burger*, 107 S.Ct. at 2644.¹⁵

Railroads, and their predecessors, were among the first modes of transportation to be extensively regulated. Although in recent years railroads have experienced some rate deregulation, governmental scrutiny remains close, particularly with respect to two areas that are vital in the present context: labor (*see, e.g.*, the Railway Labor Act, codified as amended at 45 U.S.C. § 151 *et seq.*), and safety (*see, e.g.*, the Federal Railroad Safety Act, codified as amended at 45 U.S.C. § 431 *et seq.*). Thus, railroads are "heavily regulated businesses" and well within the scope of the cases cited above.¹⁶ The railroad em-

¹⁵ The *Burger* opinion notes that "an expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home." 107 S. Ct. at 2674. The testing authorized here is administered to individuals in their status as "employees," not in their status as private citizens.

¹⁶ The Court of Appeals held that while railroads are heavily regulated, railroad employees are not, noting that employees are not licensed. This distinction has no sound foundation. The penalties and burdens of the administrative schemes in the heavily regulated business cases ultimately fall on individuals, not com-

ployees subject to the FRA's regulations here know the nature and importance of their jobs, and are well aware of the provisions of the regulations.¹⁷ Union representatives participated extensively in the notice and comment proceeding, meetings have been held to explain the regulations to affected employees, Part C testing has been heavily featured in news stories since then in connection with rail disasters, and employers administering Part D testing are required to give employees detailed notice of the provisions of that Part. *See* 49 C.F.R. § 219.309(b). As noted above, the regulations severely limit the discretion of the persons who must implement the testing program. Finally, testing must be done promptly after the accident, if it is to serve its best purpose,¹⁸ and given the

panies. The fact that the FRA did not create a licensing procedure for employees is irrelevant; it would be incongruous if the FRA could constitutionally adopt a program for determining eligibility for employment, but could not validly require the lesser intrusions occasioned here.

Moreover, as noted below, railroad employees are well aware of the regulatory scheme to which they are subject. Even more important, railroad employees *are* heavily regulated. *See, e.g.*, 49 C.F.R. Parts 217 (requiring instruction of employees on operating rules and periodic testing of rule compliance); 218 (prescribing minimum safety requirements for railroad operating rules and practices—rules and practices which for the most part must be actually implemented entirely by employees); 219, Subpart F (requiring pre-employment drug testing of applicants for positions involving operation of trains); and 220 (establishing minimum requirements governing employees' use of radio communications in connection with railroad operations).

¹⁷ The regulations as promulgated gave employees several months' notice that the testing program would be implemented, and that their consent to testing would be a condition of employment. The Third Circuit in *Shoemaker* found an analogous prior notice and consent provision to be a significant factor favoring application of the "administrative search" doctrine to drug testing of jockeys.

¹⁸ The FRA noted during the rulemaking proceeding the "difficulty associated with estimating previous alcohol and drug levels from specimens obtained some time later." 50 Fed. Reg. at 31,554. Part C tests are to be administered "as soon as possible after the

time constraints, confusion following the accident, and lack of familiarity of railroad personnel with the court systems in the many locations where accidents may occur, a warrant requirement is neither realistic nor feasible, nor really useful in protecting Fourth Amendment values. The administrative search cases justify the FRA's regulations.¹⁹

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Petition, the writ of certiorari should be granted, and the case set down for separate argument.

Respectfully submitted,

Of Counsel

HAROLD R. HENDERSON
Vice President—Law
FREDERICK C. OHLY
Associate General Counsel
NATIONAL RAILROAD PASSENGER
CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001

ERWIN N. GRISWOLD
Counsel of Record
SARAH W. PAYNE
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3898
Counsel for the Amici

J. THOMAS TIDD
Vice President and General Counsel
ASSOCIATION OF AMERICAN
RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001

April, 1988

accident or incident." 49 C.F.R. § 219.203(b)(1). Part D tests must be administered within 8 hours. 49 C.F.R. § 219.301(f).

¹⁹ It is irrelevant for present purposes that a drug test could reveal illegal activity on the part of employees. The purpose of these regulations is civil, not criminal, as the FRA's comments during the rulemaking reveal. FRA does not require that results be shared with law enforcement authorities; indeed, FRA states that "it is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation" except under a subpoena or order. 49 C.F.R. § 219.301. Compare *New York v. Burger*, 107 S. Ct. at 2649-2652.

MOTION FILED
APR 15 1988

No. 87-1555

IN THE
Supreme Court of the United States
OCTOBER TERM 1987

JAMES H. BURNLEY, IV, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE AND BRIEF AMICI CURIAE
OF THOMAS COLLEY, ANN K. FINKBEINER,
DENISE R. EVANS, ANNE B. LACKMAN,
HAROLD LACKMAN, ERNEST H. BARRY, JR.,
HARRY BAUER, LORE BAUER, ANNA KAMOLA,
JESSE CORTI, ARTHUR W. JOHNSON,
AND ANNE H. JOHNSON
IN SUPPORT OF PETITION FOR CERTIORARI

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
STEPHEN L. URBANCZYK
Hill Building
Washington, D.C. 20006
(202) 331-5000
Attorneys for Amici Curiae

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

(Attorneys of counsel continued inside cover)

* Counsel of Record

Of Counsel (continued):

WILLIAM C. SAMMONS

TYDINGS & ROSENBERG
201 North Charles Street
Baltimore, Maryland 21201

BERTRAM D. FISHER

**QUELLER, FISHER, BOWER
& WISOTSKY**
110 Wall Street
New York, New York 10005

STANLEY J. GLOD

2323 Creek Drive
Alexandria, Virginia 22308

JOHN P. COALE

COALE, KANANACK & MURGATROYD
1507 - 22d Street, N.W.
Washington, D.C. 20037

CHARLES I. APPLER

HAMEL & PARK
888 - 16th Street, N.W.
Washington, D.C. 20006

THOMAS L. BRIGHT

MARK, WEIGLE AND PERKINS
115 East King Street
Shippensburg, Pennsylvania 17257

IN THE
Supreme Court of the United States

OCTOBER TERM 1987

No. 87-1555

JAMES H. BURNLEY, IV, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**MOTION FOR LEAVE TO
FILE BRIEF *AMICI CURIAE***

Thomas Colley, Ann K. Finkbeiner, Denise R. Evans, Anne B. Lackman, Harold Lackman, Ernest H. Barry, Jr., Harry Bauer, Lore Bauer, Anna Kamola, Jesse Corti, Arthur W. Johnson and Anne H. Johnson respectfully move for leave to file the attached brief *amici curiae* in support of petitioners. Counsel have obtained the consent of petitioners to filing of this brief, and the Solicitor General's letter to that effect has been lodged with the Clerk. Respondents have declined to consent to the filing of this brief.

INTEREST OF THE *AMICI CURIAE*

Amici are survivors of some of the sixteen persons who were killed on January 4, 1987 outside Baltimore, Maryland when a Conrail locomotive driven by a marijuana-smoking engineer and brakeman ran stop signals and proceeded into the path of an Amtrak passenger train *en route* from Washington, D.C. to Boston.* The interest of the *amici* is in assuring that persons under the influence of drugs and alcohol not be permitted to operate or control trains, and that laws and regulations designed to prevent such unnecessary disasters not be struck down by judicial decisions, like the one of the United States Court of Appeals for the Ninth Circuit for which review is sought here, which fail to give adequate constitutional weight to the needs of public safety. This brief seeks briefly to outline for the Court information from judicial records that illuminates exactly what can happen when adequate drug testing of railroad employees does not take place.

ISSUES TO BE COVERED IN THE BRIEF *AMICI CURIAE*

The attached brief does not retrace the ground covered in the petition for certiorari. Instead, it seeks to bring to this Court's attention how greatly the Court of Appeals' decision threatens public safety, by reference to actual recent instances in which abuse of drugs and alcohol by railroad employees has contributed to injury and death of railroad passengers.

* *Amici* are plaintiffs in actions consolidated for discovery pending in the United States District Court for the District of Maryland. *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728. Counsel for *amici* were appointed by the District Court as lead counsel for the plaintiffs in those consolidated cases. Counsel for *amici* also represent persons injured in the 1988 collision referred to at p. 6 of the *amicus* brief. *Sala v. National Railroad Passenger Corp.*, No. 88-1572, U.S.D.C., E.D. Pa.

CONCLUSION

For the reasons stated, the motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
STEPHEN L. URBANCZYK
Hill Building
Washington, D.C. 20006
(202) 331-5000

Attorneys for Movants

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

WILLIAM C. SAMMONS
TYDINGS & ROSENBERG
201 North Charles Street
Baltimore, Maryland 21201

BERTRAM D. FISHER
QUELLER, FISHER, BOWER
& WISOTSKY
110 Wall Street
New York, New York 10005

STANLEY J. GLOD
2323 Creek Drive
Alexandria, Virginia 22308

JOHN P. COALE
COALE, KANANACK &
MURGATROYD
1507 - 22d Street, N.W.
Washington, D.C. 20037

CHARLES I. APPLER
HAMEL & PARK
888 - 16th Street, N.W.
Washington, D.C. 20006

THOMAS L. BRIGHT
MARK, WEIGLE AND
PERKINS
115 East King Street
Shippensburg, PA 17257

* Counsel of Record

April 15, 1988

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	7
APPENDICES	
A. Excerpt from transcript, <i>State v. Gates</i> , No. 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988	1a
B. Excerpt from deposition of Ricky L. Gates, <i>In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation</i> , MDL No. 728, U.S.D.C., D. Md., March 24, 1988	4a
C. Excerpt from transcript, <i>In re Special Investigation</i> , Grand Jury, Baltimore County, Maryland, May 1, 1987	10a
D. Excerpt from transcript of hearing before the Committee on Commerce, Science and Transportation, United States Senate, February 25, 1988..	12a
E. Federal Railroad Administration, Accident Investigation Update, Feb. 23, 1988	15a

TABLE OF AUTHORITIES

<i>Cases:</i>	Page
<i>National Treasury Employees Union v. Von Raab</i> , No. 86-1879	2, 7
<i>In re Rail Collision Near Chase, Maryland on Jan- uary 4, 1987 Litigation</i> , MDL No. 728, U.S.D.C., D. Md.	4
<i>State v. Gates</i> , No. 87-CR-2420, Circuit Court, Baltimore County, Md.	3
<i>Constitutional provisions:</i>	
U.S. Constitution, Fourth Amendment	2, 7
<i>Miscellaneous:</i>	
48 Fed. Reg. 30723 (1983)	6
50 Fed. Reg. 31508 (1985)	6

IN THE
Supreme Court of the United States

OCTOBER TERM 1987

No. 87-1555

JAMES H. BURNLEY, IV, *et al.*,
v. *Petitioners*,

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THOMAS COLLEY,
ANN K. FINKBEINER, DENISE R. EVANS,
ANNE B. LACKMAN, HAROLD LACKMAN,
ERNEST H. BARRY, JR., HARRY BAUER,
LORE BAUER, ANNA KAMOLA, JESSE CORTI,
ARTHUR W. JOHNSON, AND ANNE H. JOHNSON
IN SUPPORT OF PETITION FOR CERTIORARI

This brief *amici curiae* is filed by Thomas Colley, Ann K. Finkbeiner, Denise R. Evans, Anne B. Lackman, Harold Lackman, Ernest H. Barry, Jr., Harry Bauer, Lore Bauer, Anna Kamola, Jesse Corti, Arthur W. Johnson and Anne H. Johnson, contingent on the granting of the foregoing motion for leave to file. The interest of the *amici* is set forth in that motion.

SUMMARY OF ARGUMENT

The decision below, which holds that the Fourth Amendment prohibits most testing of railroad employees for drugs and alcohol, clearly conflicts with decisions of other courts of appeals that allow drug testing in many

other contexts. By its grant of certiorari in *National Treasury Employees Union v. Von Raab*, No. 86-1879, this Court will be considering one narrow and non-life-threatening aspect of the issue: testing Customs agents. Even more important, however, and therefore conceivably governed by different principles, is drug testing where the safety of the public is directly at stake. In order to have a fuller perspective on these issues in the context where they most matter—and also to protect the public from the danger to innocent victims that decisions like the Ninth Circuit's here may create—*amici* urge this Court to hear this case along with No. 86-1879, and not simply to hold it for disposition in light of principles which may not adequately reflect valid and weighty concerns of public safety that are present when impairment of the faculties of operators of public transportation is involved.

ARGUMENT

In this case the Ninth Circuit has issued a ruling that takes little account of the realities and dangers of modern life. It not only misinterprets the flexible and practical standard of the Fourth Amendment (which prohibits only those searches and seizures that are “unreasonable”), and is clearly irreconcilable with decisions of other courts. More than that, it actually places innocent lives in jeopardy.

In terms of legal argument, *amici* do not seek here to embellish the petition filed on behalf of the Secretary of Transportation and the Federal Railroad Administrator. *Amici* do seek to bring to the Court's attention the consequences in the real world when there is no adequate testing for drug- and alcohol-induced impairment of the persons who control the operation of locomotives in this country. Among several recent examples, *amici* refer in particular to a horrible and utterly unnecessary rail collision, caused in part by drug use by railroad employees, in which *amici*'s family members died.

The pertinent facts about that January 4, 1987 disaster in which sixteen people, several of them children, were killed, and nearly 200 other passengers were injured, are not in dispute. On that Sunday at 12:35 p.m., the *Amtrak Colonial* left Union Station in Washington, D.C., with an intermediate stop in Baltimore, carrying approximately 650 passengers, many of them students returning to school and families returning home after the holidays. At 1:16 p.m. a train of three Conrail locomotives left the Bayview Yard in Baltimore heading north on tracks that converged with the tracks used by *Amtrak* passenger trains in the Northeast Corridor.

The Conrail train was driven by engineer Ricky Lynn Gates. Assisting him in the cab was brakeman Edward “Butch” Cromwell. As they proceeded, sometimes exceeding speed limits, Gates and Cromwell took “hits” on a joint of marijuana, ignored signals, and watched the scenery. Neither Gates nor Cromwell was paying any attention as the train ran through a series of slow and then stop signals and finally (as Gates in panic hit the emergency brakes) at 1:30 p.m. skidded into the path of the *Amtrak* train, which was approaching from behind at a speed in excess of 100 miles per hour. The engineer of the *Amtrak* train and fifteen of its passengers were killed. Approximately 158 others were seriously injured.

Both Gates, the engineer, and Cromwell, the brakeman, were longtime habitual abusers of drugs and alcohol. Gates in later pleading guilty to manslaughter¹ acknowledged a factual finding that:

Although *Amtrak* operating rules require that the engineer call each wayside signal and that the brakeman acknowledge, no more signals further down the track were called in the remaining nine miles. After the third signal, Cromwell pulled out a pin joint, which is a very thin, hand-rolled cigarette, contain-

¹ *State v. Gates*, No. 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988.

ing marijuana that he had brought in his grip. Although he had originally intended to use it on the ride home, Cromwell decided to smoke it then with the Defendant because the two smoked while working on one previous occasion. Each man had about three hits of the joint. Then Cromwell smoked the remainder in a pipe. Although both the Defendant and Cromwell were faced forward and could clearly see the wayside signals, neither called them while smoking the joint. (P. 1a, *infra*.)

As the engineer later testified:²

Q. . . . What did you do when Mr. Cromwell pulled out the marijuana cigarette at about River?

A. He asked me if I wanted to smoke it then, and I told him it was his, it was up to him, that I would prefer if we were going to smoke anything, to wait until we got on the Port Road branch. . . .

Q. What was the reason you wanted to wait for the Port Road branch?

A. The scenery was better, the river on one side, the trees on the other, I felt it was more enjoyable there.

* * * *

Next thing I recall is through the conversation, I was running assuming we were going to go out or keep moving at Gunpow Interlocking, and I was trying to make, save as much time as I could, I pulled the throttle out a little more is the last thing I remember.

* * * *

I know I was talking to Butch, I glanced at him. . . . I probably glanced at the speed indicator at some point, the scenery around me and the signal. I was taking in quite a bit. (Pp. 4a-6a, *infra*.)

The Conrail engineer's abuse of drugs and alcohol was nothing new. He testified:

² In a deposition in consolidated civil actions arising out of the collision, *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, U.S.D.C., D. Md.

Q. What quantities were you normally drinking alcohol?

A. Anywheres from a minimum of a six-pack a day to a case and a half, two cases a day.

Q. A six-pack to a case or two cases a day; is that correct?

A. Sometimes, yes.

Q. And what was your average consumption? Was it closer to one case?

A. Average consumption was close to a case, yes.

MR. SARSFIELD: What was the answer to that? Average consumption was what?

A. Probably close to a case of beer a day.

Q. It was that pretty much every day?

A. Almost every day, yes.

Q. And by a case of beer, of course, we are referring to 24, 12-ounce cans of beer; is that correct?

A. Yes.

Q. For what period of time had you been consuming alcohol at that rate of almost a case a day, or over a case a day?

A. I would say for close to a year at that time.

Q. And during what times of day would you do your drinking?

A. Any time.

Q. What time of day would you start drinking?

A. Any time.

* * * *

Q. How frequently were you using marijuana at this point in time?

A. Maybe once or twice a week.

* * * *

Q. For what period of time had you been using marijuana at this rate?

A. Since about the age of 18.

* * * *

Again, I might add I am subject to blackouts under the influence of drugs and alcohol. (Pp. 7a-9a, *infra*.)

The brakeman testified that this was not the first time that he and the engineer had operated a locomotive while smoking marijuana. Pp. 10a-11a, *infra*. Nor was drug use by these two railroad workers unique. The engineer testified to having been sent to drive a locomotive when he said he was too drunk to drive an automobile. P. 12a, *infra*. He also testified:

Q. Did you ever use marijuana or any other illegal drugs with any of your Conrail co-workers?

A. Yes.

Q. The answer is yes?

A. Yes.

Q. On how many occasions?

A. I don't know.

* * * *

Q. How frequently did you use marijuana with your Conrail co-workers in 1986?

A. I can't recall any—I don't know how to answer it as far as frequency goes, but it was a number of times.

Q. More than ten?

A. Probably.

Q. More than 20?

A. Maybe. (Pp. 8a-9a, *infra*.)

The collision outside Baltimore unfortunately is not an isolated incident. As the petition notes, at 3, the Federal Railroad Administrator in 1983 found that "Alcohol impairment and drug impairment have been identified as causal or contributing factors in a number of train accidents and employee fatalities over the past ten years." 48 Fed. Reg. 30723 (1983); see also 50 Fed. Reg. 31508 (1985).

Since that time the problem has not been cured. In addition to the collision previously described, there have been other documented serious drug-related railroad accidents recently. For example, on January 29, 1988, near Chester, Pennsylvania, an Amtrak passenger train plowed into a railroad maintenance-of-way vehicle on the

tracks ahead of it. At least nineteen persons were injured. The operator of the switch which should have stopped the train hid from authorities for three days; when he gave himself up and was tested, his urine showed positive for use of four different drugs: marijuana, cocaine, methamphetamine, and amphetamine. See pp. 15a-17a *infra*.

Drug testing of public employees is one thing in the context of Customs agents, the case in which this Court has already granted certiorari. *National Treasury Employees Union v. Von Raab*, No. 86-1879. It may be quite another in the far more compelling case where the persons who claim that their drug habits are their own constitutionally secret business are driving four-hundred-ton locomotives and killing and injuring members of the public.

The existence of widespread drug and alcohol abuse by railroad employees is increasingly well documented. It is a public danger that is not beyond corrective actions. *Amici* respectfully submit that the Fourth Amendment does not stand in the way of the wise and needed—indeed, really minimal—precautions that the Ninth Circuit here, invoking that Amendment, outlawed. This Court's consideration of the Fourth Amendment's rule of reason as applied to drug and alcohol testing will be illuminated if certiorari is granted to consider the case of workers who threaten the public safety as well. The "integrity of their bodies," Pet. Cert. 21a, which the Ninth Circuit concluded was a dominant concern at stake, should include consideration of the integrity of the bodies of passengers killed or injured as a result of drug and alcohol abuse by railroad employees.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
STEPHEN L. URBANCZYK
Hill Building
Washington, D.C. 20006
(202) 331-5000

Attorneys for Amici Curiae

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

WILLIAM C. SAMMONS
TYDINGS & ROSENBERG
201 North Charles Street
Baltimore, Maryland 21201

BERTRAM D. FISHER
QUELLER, FISHER, BOWER
& WISOTSKY
110 Wall Street
New York, New York 10005

STANLEY J. GLOD
2323 Creek Drive
Alexandria, Virginia 22308

JOHN P. COALE
COALE, KANANACK &
MURGATROYD
1507 - 22d Street, N.W.
Washington, D.C. 20037

CHARLES I. APPLER
HAMEL & PARK
888 - 16th Street, N.W.
Washington, D.C. 20006

THOMAS L. BRIGHT
MARK, WEIGLE AND
PERKINS
115 East King Street
Shippensburg, PA 17257

* Counsel of Record

April 15, 1988

APPENDICES

APPENDIX A

Excerpt from transcript, *State v. Gates*, No. 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988.

* * * *

[45] On moving out onto Track 1 out of the yard, Cromwell sat in the firemen's seat while the Defendant sat at the controls. Both faced forward. The Defendant called out the first two to three signals within one and a half miles of the yard as Clear, which would be displayed as these signals on this chart. And, at that time, Cromwell acknowledged the Defendant calling out nine signals. Although Amtrak operating rules require that the engineer call each wayside signal and that the brakeman acknowledge, no more signals further down the track were called in the remaining nine miles. After the third signal, Cromwell pulled out a pin joint, which is a very thin, hand-rolled cigarette, containing marijuana that he had brought in his grip. Although he had originally intended to use it on the ride home, Cromwell decided to smoke it then with the Defendant because the two smoked while working on one previous occasion. Each man had about three hits of the joint. Then Cromwell smoked the remainder in a pipe. Although both the Defendant and Cromwell were faced forward and could clearly see the wayside signals, neither called them while smoking the joint.

* * * *

[56] The Victims Of The Collison. In addition to the death of the Amtrak Engineer, Jerome Evans, 15 passengers were killed as a direct result of the collison. Caroline and Uriel Bauer, ages 26 and 27, respectively, a recently married couple who resided in Manhattan, New York, both occupied the second [57] coach car, which is the second passenger car in the consist. Caroline was pronounced dead at 7:12 p.m. on January 4th, 1987 as a

result of cranial injuries and smoke inhalation. Her husband, Uriel, was pronounced dead at 3:57 a.m. on January 5th, 1987 as a result of compression asphyxiation.

Esther Burkhart, age 71, who lived in Philadelphia, Pennsylvania, also occupied the second car. Mrs. Burkhart died as a result of multiple traumatic injuries primarily to her head and chest.

James Clay, age 33, from Vernon, Connecticut, sat in the second car. Mr. Clay was pronounced dead at 4:38 a.m. on January 5, 1987 as a result of compression asphyxia.

Thomas C. Colley, age 18, a freshman at the Rhode Island School of Design, sat in the second car on his return to school in Providence. Thomas was pronounced dead at 7:45 p.m. as a result of multiple blunt injuries, burns and smoke inhalation.

Laura Corti, age 22, occupied the second car on her return home to New York City. She was pronounced dead at the scene at 4:05 a.m. on January 5, 1987 from compression asphyxia.

Louise Edler, age 70, a resident of Wayne, Pennsylvania, occupied the third car in the consist. Mrs. Edler died of multiple injuries.

Ceres M. Horn, age 16, a resident of Baltimore County, Maryland was returning to school at Princeton [58] University, where she was a freshman honor student. Ceres, who sat in the second car, died as a result of compression asphyxia.

Christiane Johnson, age 20, a senior at Stanford University, rode in the second car traveling from her parents' home in Potomac, Maryland to New York to visit her sister. Christiane was pronounced dead at 4:48 a.m. on January 5, 1987 as a result of compression asphyxia.

Corrine and Kirsten Luce, sisters, age 13 and 16 respectively, occupied the second coach car on their return

home to Westerly, Rhode Island. Kirsten was pronounced dead at 5:25 a.m. on January 5, 1987 from cranio-cerebral trauma. Corrine was pronounced dead at 1 o'clock p.m. on January 5, 1987 due to multiple trauma to the cranio-cervical and thoracic region.

Adam Moore, age 7, and his grandmother, Peggy Moore, age 52, were seated in the second car on their trip home to Neptune, New Jersey. Adam was pronounced dead at 11:24 p.m. on January 4, 1987 as a result of compression asphyxia. Mrs. Moore was pronounced dead on January 5, 1987 at 1:14 a.m. due to multiple injuries.

Christina Piasecka, age 41, from Warsaw, Poland occupied the third car. Ms. Pisasecka died of multiple injuries.

Connie Barry, age 31, occupied the second car on her return home to Ridgefield, Connecticut after visiting family in the Washington area. Mrs. Barry was trapped in the wreckage for 10 hours while rescue workers attempted to free her. She [59] was flown by helicopter to Shock Trauma, where she subsequently died at 6:20 a.m. on January 13, 1987 as a result of multiple injuries and hypothermia.

Approximately 174 passengers and crew of the Colonial sustained serious injuries and required treatment at local hospitals. Numerous fire fighters, police, paramedics, and National Guard responded to the wreck site to render emergency assistance.

. . . .

APPENDIX B

Excerpt from deposition of Ricky L. Gates, *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, U.S.D.C., D. Md., March 24, 1988.

* * * *

[74] Q. When you left the Bayview Yard, what did you and Mr. Cromwell do?

A. We started some general conversation, I don't remember specifically what all the conversation was. It generally had to do with he was saying about a trip before then, we were complaining about the condition of the engines and that they should have been prepared for us before we signed up, and as we got north of River Interlocking, I believe, he had pulled out half of a pin joint of marijuana and asked if I wanted to smoke some.

Q. Up to that point had you been calling out [75] the signals?

A. Those two signals I did call.

Q. Which ones were they?

A. North Point and River.

Q. Was Mr. Cromwell also required to call out the signals?

A. Yes.

Q. Did he call out those first two signals?

A. I don't recall him calling them out, no.

Q. Do you recall him calling out any of the signals?

A. No.

Q. Did you call out any signals after River?

A. Not to my knowledge. Well, other than the stop signal, when I saw that.

Q. At the Gunpow Interlocking?

A. Yes.

Q. Okay. What did you do when Mr. Cromwell pulled out the marijuana cigarette at about River?

A. He asked me if I wanted to smoke it then, and I told him it was his, it was up to him, that I [76] would prefer if we were going to smoke anything, to wait until we got on the Port Road branch.

MR. SARSFIELD: Wait until what? I am sorry.

A. Until the Port Road branch.

Q. What was the reason you wanted to wait for the Port Road branch?

A. The scenery was better, the river on one side, the trees on the other, I felt it was more enjoyable there.

* * * *

[77] A. The next thing I remember, we were still talking, I don't remember the exact nature of the conversation, we were still in the nature of complaining about the engines and him telling me something about the trip before then and his brother or something. And he put what was left of the joint into a pipe and he started lighting it up.

Q. At that point you had had three hits on the joint?

A. I believe so, yes.

Q. And then he put the remains of the joint into a pipe; is that correct?

A. Yes.

Q. What did he do with that?

A. He lit it up. He passed it to me at one point, but it had gone out, and I could—I don't recall whether I either tasted it before I tried to [78] light it, or I just smelled it, but I could smell the remnants of PCP in the pipe. And I handed it back to him and more or less I was agitated about it, and I mentioned it to him, and he told me it was his girlfriend's pipe and she had probably smoked it.

Q. Does PCP have an odor?

A. Yes, like parsley flakes. That was the only experience I had ever had with it years before, and that is what it smelled like, and so that's what I assume it was.

* * * *

[82] A. Next thing I recall is through the conversation, I was running assuming we were going to go out or keep moving at Gunpow Interlocking, and I was trying to

make, save as much time as I could, I pulled the throttle out a little more is the last thing I remember.

* * *

[88] Q. Now, as you were approaching signal 816, what were you looking at?

A. I don't recall specifically, for the same reasons. I know I was talking to Butch, I glanced at him, because that's at the point where he was cutting off the tops of the water bottles, and I observed part of that. I probably glanced at the [89] speed indicator at some point, the scenery around me and at the signal. I was taking in quite a bit.

* * *

[104] Q. All right. What happened next?

A. Like I say, the general conversation, looking around at the scenery, then I suppose at approximately five to six pole lengths at the point [105] where I would have started slowing down to 40 before the interlocking I glanced up and I noticed the stop signal in front of me. I yelled to Butch more or less something obscene was the adjective I used that we got a stop signal, put it into emergency with the automatic brake, put the independent brake all the way on, put the throttle completely in the off position, took the reverser and threw it to the south position, pulled the throttle back out, which is called plugging the engines. We started sliding through, I grabbed the portable radio, just before we got under the signal, I started yelling three emergencies and started yelling our location and what was going on, that we were going through the stop signal, and I was more or less giving a play by play, that I wasn't sure we were going to get through the switch or not. Butch at that point was putting on his jacket, and he got off around the front of the engine and went down on the steps and as we slid slowly through the switch, he stepped off on to the ground and stood [106] at the switch as we continued sliding further.

* * *

[140] Q. What quantities were you normally drinking alcohol?

A. Anywheres from a minimum of a six-pack a day to a case and a half, two cases a day.

Q. A six-pack to a case or two cases a day; is that correct?

A. Sometimes, yes.

Q. And what was your average consumption? Was it closer to the one case?

[141] A. Average consumption was probably close to a case, yes.

MR. SARSFIELD: What was the answer to that? Average consumption was what?

A. Probably close to a case of beer a day.

Q. It was that pretty much every day?

A. Almost every day, yes.

Q. And by a case of beer, of course, we are referring to 24, 12-ounce cans of beer; is that correct?

A. Yes.

Q. For what period of time had you been consuming alcohol at that rate of almost a case a day, or over a case a day?

A. I would say for close to a year at that time.

Q. And during what times of day would you do your drinking?

A. Any time.

Q. What time of day would you start drinking?

A. Any time.

* * *

[142] Q. How frequently were you using marijuana at this point in time?

A. Maybe once or twice a week.

Q. How much would you use over the week, in terms of a quarter of an ounce?

[143] A. Usually two or three joints at that time. Prior to Christmas, I believe a couple of weeks before Christmastime, I had been on vacation for a week, and I

had smoked about a quarter ounce of marijuana while I was on vacation.

Q. For what period of time had you been using marijuana at this rate?

A. Since about the age of 18.

* * *

BY MR. BUCKLEY:

Q. Would you admit that if you had not had the distractions and had been paying attention, you would have been able to see the home signal in time and to have stopped before going through the switch at Gunpow?

A. Probably would have, yes.

* * *

[215] A. I was starting to believe that I was psychologically addicted to marijuana, that—because I couldn't make myself quit, unless I replaced it with alcohol. And I was daydreaming quite a bit, when I was off to myself.

Q. Did you ever use hash?

A. Yes.

Q. How frequently did you use hash, hashish?

A. Not very frequently, you know. You use it just the same way as I would marijuana, but it wasn't as available.

Q. Did you use it in 1986?

A. I can't recall specifically; maybe.

Q. Did you ever use marijuana or any other illegal drugs with any of your Conrail co-workers?

A. Yes.

Q. The answer is yes?

A. Yes.

Q. On how many occasions?

A. I don't know.

[216] Q. Did that occur in 1986?

A. Yes.

Q. Was that a fairly frequent occurrence?

MR. SARSFIELD: Objection to leading.

Q. How frequent was the occurrence?

MS. SHEARER: If I might have a moment.

A. Would you repeat the question, please?

Q. How frequently did you use marijuana with your Conrail co-workers in 1986?

A. I can't recall any—I don't know how to answer it as far as frequency goes, but it was a number of times.

Q. More than ten?

A. Probably.

Q. More than 20?

A. Maybe.

* * *

[222] A. . . . Again, I might add I am subject to blackouts under the influence of drugs and alcohol.

Q. How common is the use of drugs or marijuana by Conrail employees?

MR. SARSFIELD: Objection.

A. I couldn't answer that.

Q. What is the reason you couldn't answer that?

A. Because I am not accountable for everyone else.

Q. Just talking in terms of your knowledge, [223] based on your knowledge, how frequent is the use of marijuana or other illegal drugs by Conrail employees?

MR. SARSFIELD: Objection, please.

A. Again, I can only answer for myself, and whoever was around me, if they did it, and they were around me when I was doing it, then we did it, or if they had it, I was around them, we did it. But I am not sure how to answer as far as frequency goes. Sometimes it was infrequent, sometimes more frequent than others.

Q. So it is something you did have occasion to observe from time to time; is that fair to say?

A. Yes.

Q. Okay. How long have you been subject to blackouts?

A. I am not sure about that either. I hadn't even been aware of it, until I started into recovery, that I was having blackouts.

* * *

APPENDIX C

Excerpt from testimony of Edward Walter Cromwell before the Grand Jury, in the Circuit Court for Baltimore County, Maryland, *In re Special Investigation*, May 1, 1987.

* * *

[103] Q: Were you doing anything at that time besides calling the signals?

A: That's when I reached in and got my joint out.

Q: The pin joint?

A: Yes.

Q: At what point? Was it after you called those two signals or before or during?

A: I believe it was right after or maybe even before [104] the North Point signal.

Q: Before the North Point signal?

A: I'm not exactly sure, but it was right outside of the yard.

Q: Outside of the yard?

A: As we were leaving Bay.

Q: As you were leaving Bay while you were on track number one?

A: Right, yes.

Q: And did you light the joint?

A: Yes, I did.

Q: What did you do with it?

A: We smoked it.

Q: When you say we, who do you mean?

A: Rick and I smoked.

Q: And how many hits off of it did you have?

A: I believe three.

Q: And how many did Rick have?

A: Probably about three also.

Q: Now, why did you pull that out? Why did you do that with Gates?

A: I have smoked with him on one other occasion.

Q: On a train?

A: Yes.

Q: When he was the engineer?

[105] A: Yes.

Q: What did you do with the remainder that was left of the joint after you each took some hits?

A: I smoked the roach in a bowl that I had.

Q: And by bowl you mean—

A: Pipe.

Q: And what did you do after that?

A: Put the bowl in my bag and started making lunch.

* * *

[115] A: I went back up to the north engine, the 5044, to see if Rick was okay, dead, or what was going on.

Q: And what did you find when you got up there?

A: He wasn't there and the portable radio wasn't there.

Q: So, what did you do?

A: I got my bowl out of my bag and got back down off the engine and I hid the bowl somewhere in somebody's yard. I'm not sure where. I started walking up to where the wreck was. I seen a rescue worker and they asked me if I was involved in the wreck. I said, Yes. He said, Walk out to the road and get in an ambulance.

* * *

[125] Q: And when you went to the NTSB [National Transportation Safety Board] hearing, did you testify that you had smoked with Gates on the run?

A: No, I told them that we didn't smoke at all that day.

Q: You denied it?

A: Yes.

Q: And to your knowledge did Gates deny that also?

A: Yes.

* * *

[130] Q: Had you ever—you had ridden before with Gates?

A: Yes. From what I know he's a good engineer, he knows all of the rules.

* * *

APPENDIX D

Excerpt from transcript of hearing before the Committee on Commerce, Science and Transportation, United States Senate, February 25, 1988

[89] THE CHAIRMAN [Senator Hollings]: . . . I take it on this one occasion that you pointed to in your own testimony, where you called in and said you were not ready to go to work, they said come on in anyway and that you looked okay. Can you elaborate on that?

MR. GATES: Well, it was a clerk that called me, that is required to order me for work. At that time he was going to show me refusing duty, which would have put me under disciplinary measures at work, and also it would cause him some hardships.

And so I told him more or less that I would show up at work if he would call the trainmaster that was on duty and tell him what condition I told him I was in. I told him I was drunk.

I told him I would have a friend of mine drive me to work because I was not capable of driving myself, and we would put it in his lap and let him decide, with no intention myself of actually having to run a train that night.

When I did show up, I stopped briefly and got a coffee and walked into the back room where the trainmaster's office was. My crew was already there with him and was aware of what to expect from me when I walked in. I was spilling the [90] coffee all over the place because I was not walking straight.

And he told me I looked okay and that another member of my crew would keep me awake during the trip.

THE CHAIRMAN: What about the attitude of the employees? That indicates to me that when you do get in trouble and know you are not in a condition, that you

do not mind stating so and you do have this responsibility foremost in mind.

If you had a vote amongst the employees you have been with on random testing, would they vote aye or no? Would they vote and say no, we do not want to have such a thing, or would they vote and really consider it good for them as well as the traveling public?

What would be your opinion?

MR. GATES: Well, I know the union's position on it. I cannot answer for the other employees. But I know for myself, I would think, based on that, others would answer similarly.

As I said before, denial is the hallmark of the disease. That is the main thing. Nobody wants to get caught. You will deny and you will lie your way out of it if at all possible, and you will do anything you can to keep from being tested positive, or to even take the test in some instances.

* * *

[95] SENATOR DANFORTH: And have there been other cases, other than your own case, when the supervisor said, well, you are good enough to work? Do you know other cases when the supervisor had seen somebody on the job or seen somebody before he goes on the job and allowed him to proceed with his work?

MR. GATES: My case was the only one where I have experienced someone actually ordering me, knowing me and having me tell them I was intoxicated. I have been in other situations where the person I was working with, we both confronted a supervisor and we were—well, at least he was blatantly drunk, anyway, drunk enough to tell by looking and sniffing or whatever you want to do. And it was ignored.

[96] SENATOR DANFORTH: It was ignored by the supervisor?

MR. GATES: Yes, sir.

SENATOR DANFORTH: Do you think that during the 14 years you have been on the railroad that it has

been a common everyday occurrence that people have operated trains while they have been impaired by alcohol or drug use?

MR. GATES: As I said before, I have not worked there in the past year, but I have no reason to believe that anything has changed. It had slacked off for the past few years that I had worked there as far as visibility. That is why I cannot say whether some of the employees were continuing their practices or not.

But originally when I worked there, when I started working under Penn Central, it was a common everyday practice.

* * * *

APPENDIX E

February 23, 1988

FEDERAL RAILROAD ADMINISTRATION ACCIDENT INVESTIGATION UPDATE CHESTER, PENNSYLVANIA JANUARY 29, 1988 AMTRAK

BACKGROUND:

The accident occurred at 12:32 a.m. near Chester, Pennsylvania, when Amtrak's No. 66 (Night Owl) train—which should have been diverted to a clear track—was permitted to proceed onto a stretch of trackage occupied by a Maintenance of Way vehicle. The block tower operator who controlled the signal at the point where the Amtrak train should have been diverted fled the premises in mid-shift, immediately after the occurrence of the accident. The two locomotive units derailed and overturned. All 10 cars derailed and remained upright. The engineer and 18 passengers were injured.

CASUALTIES AND PROPERTY DAMAGE:

Nineteen people were injured. Property damage is estimated at \$297,150.

POST-ACCIDENT TESTING:

Train Crew and Others: Samples were obtained from the Amtrak engineer, conductor, four assistant conductors, the train dispatcher, a signal maintainer shortly after the accident, and from the block operator on the afternoon of February 1, 1988. One assistant conductor tested positive for the marijuana metabolite in the blood (27 ng) and urine (27 ng). Tests on all other crew members were negative.

Block Operator: The accident occurred at approximately 12:32 a.m. on January 29, 1988. The block operator left his post without authorization and accordingly was not available for post-accident toxicological testing required by FRA rules. On the afternoon of February 1, 1988, three and one-half days after the accident, the block operator met with representatives of the parties to the accident investigation.

At the conclusion of that interview, the block operator was asked if he would submit to testing under the Federal regulations, and he agreed to do so. He was then taken to a medical facility where specimens were collected shortly after 4:00 p.m. The samples were sent to the Center for Human Toxicology for testing under the FRA rule.

The block operator tested positive for the following compounds: for the marijuana metabolite in the blood (8 ng/ml) and urine (89 ng/ml); for the cocaine metabolite in the urine (81 ng/ml); and for methamphetamine (74 ng/ml) and amphetamine (48 ng/ml) (possibly present as a metabolite of methamphetamine) in the urine. Other tests for drugs and alcohol were negative.

In view of the fact that the block operator had absented himself following the accident, FRA instructed the Center to test his specimens down to the sensitivity of the particular tests to determine the smallest detectable amount consistent with the reliability of the test procedures and equipment. Since drugs and their metabolites are eliminated from the body over a period of time that differs by type of drug, frequency of use, dosage, and other factors, testing in the range below the normal "administrative detection limit" (or usual cut-off levels) extends the period during which the drug is detectable.

Attached is an excerpt from FRA's Field Manual that indicates the "general parameters" for drug detection over time. This table assumes normal screening and con-

firmation cut-offs higher than those employed in the subject tests.

William E. Loftus
Angela Sullivan
Federal Railroad Administration
(202) 366-0881
February 23, 1988

RESULTS OF TOXICOLOGICAL ANALYSIS— BLOCK OPERATOR

Chester, Pa.; Amtrak; January 29, 1988
(In Nanograms (ng) (per Mililiter))

Drug	Center for Human Toxicology (FRA)			
	Blood	Urine	(1/)	(2/)
Marijuana metabolite	8 ng.	89 ng	(20 ng)	(20 ng)
Cocaine metabolite	neg.	81 ng	(10 ng)	(150 ng)
Methamphetamine	neg.	74 ng	(20 ng)	(100 ng)
Amphetamine ³	neg.	48 ng	(20 ng)	(100 ng)

^{1,2} Because the tests were not performed until the fourth day after the accident, FRA requested its laboratory to test the specimens down to the sensitivity of the assays (the lowest level at which the compound can be reliably identified). The first number in parenthesis is the sensitivity of the test; the second is the administrative reporting cut-off (on confirmation) for normal reporting purposes when specimens are collected within a reasonable time after the accident. The cocaine metabolite and methamphetamine/amphetamine results would have been reported as negative under normal reporting practices.

³ Possibly present as a metabolite of methamphetamine.

(5)
No. 87-1555

Supreme Court, U.S.

FILED

APR 15 1988

JOSEPH F. SPANOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES'
ASSOCIATION, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA EMPLOYMENT
LAW COUNCIL AS AMICUS CURIAE
IN SUPPORT OF THE PETITION

VICTOR SCHACHTER
Counsel of Record
LAWRENCE HECIMOVICH
SCHACHTER, KRISTOFF, ROSS
SPRAGUE & CURIALE
101 California, Suite 2900
San Francisco, CA 94111
(415) 391-3333

Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
BRIEF OF <i>AMICUS</i>	1
INTEREST OF <i>AMICUS</i> CELC	2
REASONS FOR GRANTING THE WRIT	4
I. FACTS AND SUMMARY OF POSITION	5
A. Facts	5
B. Summary of Position	7
II. REVIEW IS NECESSARY TO RESOLVE A DIRECT CONFLICT AMONG THE CIRCUIT COURTS	8
A. The Ninth Circuit's Rejection Of The Gov- ernment's Public Safety Justification Con- flicts With The Opinions Of Other Circuits ...	8
B. The Ninth Circuit's "Particularized Suspi- cion" Standard Is Improper And Contradicts The Holdings Of Other Circuit Courts	11
1. The Ninth Circuit standard is inappro- priate in light of prior Supreme Court rulings	12
2. Other circuits have consistently upheld testing in the absence of particularized suspicion	13
III. REVIEW SHOULD BE GRANTED TO AD- DRESS IMPORTANT QUESTIONS OF CON- STITUTIONAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	16
IV. THE COURT SHOULD GRANT REVIEW TO PROVIDE GUIDANCE REGARDING IMPOR- TANT ISSUES NOT RAISED BY VON RAAB	19
V. CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES:

<i>Allen v. City of Marietta</i> , 601 F.Supp. 482 (N.D. Ga. 1985)	17
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	8
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982)	3
<i>Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company</i> , 838 F.2d 1087 (9th Cir. 1988)	3, 17, 18
<i>Burka v. New York City Transit Authority</i> , No. 85 Civ. 5751 (S.D.N.Y., Feb. 1, 1988)	17
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	15
<i>Division 241 Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976)	4, 9, 11, 13, 16, 17
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1987)	4, 9, 11, 13, 16, 17
<i>Lovvorn v. City of Chattanooga</i> , 647 F.Supp. 879 (E.D.Tenn. 1986)	17
<i>McDonell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987)	4, 10, 11, 13, 16, 17
<i>National Federation of Federal Employees v. Carlucci</i> , No. 86-0681 (D.D.C. Mar. 1, 1988)	17
<i>National Treasury Union v. von Raab</i> , 816 F.2d 170 (5th Cir. 1987), cert. granted, No. 86-1879 (Feb. 29, 1988)	4, 7, 14, 19, 20
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	12
<i>O'Connor v. Ortega</i> , 127 S.Ct. 1492 (1987)	9
<i>Railway Labor Executives' Association v. Burnley</i> , 839 F.2d 575 (9th Cir. 1988)	passim

TABLE OF AUTHORITIES—Continued

Page

<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3rd Cir.), cert. denied, 107 S.Ct. 577 (1986)	4, 14, 15, 19
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	9
<i>Turner v. Fraternal Order of Police</i> , 500 A.2d 1005 (D.C.App. 1985)	17
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984)	3

STATUTES AND REGULATIONS

49 C.F.R. 219.1:	
Subpt. A, Section 219.1(a)	3
Subpt. C, Sections 219.201 to 219.213	5
Section 219.201	5
Section 219.203	5

No. 87-1555

In The
Supreme Court of the United States
October Term, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES'
ASSOCIATION, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA EMPLOYMENT
LAW COUNCIL AS AMICUS CURIAE
IN SUPPORT OF THE PETITION

The California Employment Law Council ("CELC" or "*amicus*") submits this brief as *amicus curiae* to urge the Court to review the holding below that regulations of the Federal Railroad Administration mandating blood and urine testing of railroad employees involved in specified train accidents and fatal incidents, and authorizing breath and urine tests after specific accidents, incidents and rule

infractions, violate the Fourth Amendment since they do not require "individualized" suspicion of drug or alcohol impairment prior to testing.¹

INTEREST OF AMICUS CELC

CELC is a voluntary nonprofit organization composed of more than 60 companies employing over 400,000 persons. Its members represent a broad segment of the employer community in California. *Amicus* was formed to promote the common interests of employers and the public in sound procedures and laws pertaining to employment practices. CELC members do business throughout the Ninth Circuit, and thus must adhere to its rulings.

While governmental entities such as petitioner are not members of CELC, *amicus* represents many private companies within industries subject to extensive governmental regulation designed to promote safety of employees and the public. In addition, virtually all of CELC's members, in the operation of their businesses, rely upon heavily regulated industries, and particularly transportation, to provide safe and reliable services. Many of these companies handle and require the transport of commercial products which could endanger the public in the event of a serious accident. Moreover, numerous CELC members have embarked upon comprehensive safety programs to ensure the well-being of their employees and the public, and these programs entail the prevention of substance abuse in the workplace.

¹ Petitioners and Respondents have consented to the filing of this brief.

In promulgating the regulations in this case, the Federal Railroad Administration ("FRA") sought to achieve safety objectives which are of great concern to CELC and its members, to wit, "to prevent accidents and casualties . . . that result from impairment of employees by alcohol or drugs" [49 CFR 219.1(a)]. Further, many CELC members, in order to assure a safe working environment, have developed substance abuse policies which, like the regulations in issue, require urine testing of employees after certain accidents, incidents, and rule violations, without a showing of "individualized" suspicion. Notwithstanding that CELC members are in the private sector, and therefore not subject to Fourth Amendment prohibitions,² the clarification of drug testing issues in this case will undoubtedly impact all employers. Indeed, the Ninth Circuit has already applied *Burnley* to a private sector, post-accident testing program, holding that its "individualized suspicion" requirement was "readily applicable". *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087, 1093 (9th Cir. 1988).³

Accordingly, *amicus* has a strong interest in the outcome of this matter. CELC believes that the Ninth Circuit's decision unjustifiably frustrates the proper regulation of employee and public safety and erroneously restricts legitimate substance abuse testing.

² *United States v. Jacobsen*, 466 U.S. 109 (1984). While the Fourth Amendment applies primarily to public sector employers, courts have applied its protections in the private sector where significant government involvement is present. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982).

³ A petition for review of the Ninth Circuit's decision in *Burlington Northern* was filed with the Court on April 1, 1988 (Docket no. 87-1631).

REASONS FOR GRANTING THE WRIT

In ruling that individualized suspicion is necessary before drug screening can be implemented under the FRA's post-accident testing regulations, the Ninth Circuit has rendered a decision which conflicts with the decisions of every other federal court of appeals which has dealt with the drug testing issue. *National Treasury Union v. von Raab*, 816 F.2d 170, (5th Cir. 1987), *cert. granted*, No. 86-1879 (Feb. 29, 1988); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir.-1987); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986); and *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976). The Ninth Circuit's contrary position rests upon its determination that the other circuits did not consider "precisely the factors we consider relevant" (*von Raab*); reached a decision "without very thorough analysis" (*Suscy*); incorrectly reasoned that "urine testing is a lesser intrusion than body searches" (*McDonell*); and adopted a "rationale [not] applicable to the employees in our case" (*Shoemaker*). The Ninth Circuit's opinion in *Burnley* has introduced conflict and confusion to the issue, and review is highly desirable and appropriate.

Further, review is warranted because the Ninth Circuit decision, together with the other circuit court opinions which have addressed drug testing issues, raises important questions of federal law which have not been, but should be, settled by this Court. The new technology of drug testing, the exponential escalation of substance abuse in the workplace, and the tragic endangerment of employees and

the public as a result of drug-related accidents have spawned a plethora of search and seizure cases which cry out for authoritative resolution and guidance. Since the scope of Fourth Amendment protections has not previously been considered by this Court in the context of drug screening and critical safety interests, review is most appropriate.

I. FACTS AND SUMMARY OF POSITION

A. Facts

Since the facts have been fully described in petitioners' brief, CELC will highlight certain areas which underscore that review is warranted.

After several years of rulemaking, pursuant to its delegated authority under the Federal Railroad Safety Act of 1970, the FRA promulgated regulations designed to prevent accidents, injuries and property losses due to alcohol and drug impairment of railway employees. The regulations were finalized after the FRA considered extensive safety data and evaluated the viewpoints of industry, labor and the general public.

It is important to emphasize that the regulations in question require railroads to conduct blood and urine testing only in *limited* situations where railroad employees are "directly" involved in a "major train accident,"⁴ and authorize railroads to conduct breath and urine tests

⁴ Subpart C (49 C.F.R. 219.201-213) defines a "major" accident as one which involves a fatality, the extensive release of hazardous material, or a reportable injury or damage of \$50,000 or more. (49 C.F.R. 219.201, 203).

where two supervisors have "reasonable suspicion" that an employee is under the influence of or impaired by alcohol or drugs, based upon specific observations concerning the appearance or behavior of the employee. In addition, the regulations provide procedural safeguards for employees, including the right to disciplinary hearings and the right to insist upon blood testing for the most accurate determination of impairment.

When respondents challenged the regulations on constitutional and statutory grounds, the district court granted summary judgment for petitioners, ruling that the governmental interest in railway safety for employees and the general public was paramount. The lower court noted that "objective" triggering events were necessary to justify testing, and that the regulations made a "genuine attempt" to reasonably limit the scope of the testing requirements. Finding the railroad industry to be "pervasively regulated," the court applied the standard of constitutional scrutiny for administrative searches, and found the tests reasonable in light of the government's interest in safety.

The Ninth Circuit reversed, holding that "individualized suspicion" was required before drug testing could be "justified at its inception" so as to meet Fourth Amendment requirements. The court refused to apply the administrative search standard and ruled that the tests were not "reasonably related" to improving rail safety, as they could not detect current drug intoxication or degree of impairment. The Ninth Circuit concluded that the Fourth Amendment required "observable symptoms of impairment with a positive [test] result," and not just involvement in an accident, to provide a "sound basis" for drug testing and potential disciplinary action.

B. Summary of Position

The Court should grant certiorari for two reasons. First, review is necessary to resolve the conflict among the circuits on the issues presented. Employers that require drug testing upon the occurrence of an accident are at a total loss to determine which precedent to follow. This is particularly true where, as in the case of many CELC members, employers do business throughout the United States and find it impossible to reconcile the inconsistent rulings. Review is highly desirable and necessary to achieve clarity and uniformity in the law.

Second, the Court should review the Ninth Circuit's decision because it presents an issue of major legal significance and is seriously flawed in its constitutional analysis. The court did not balance the competing interests which should have been considered under the "reasonableness test" required by the Fourth Amendment. The Ninth Circuit's failure to weigh factors of safety and health, which have been consistently recognized as compelling by other circuit courts, has resulted in an erroneous decision on a critical constitutional question.

Given the confusion and uncertainty engendered by the Ninth Circuit's opinion, it is imperative that this Court provide direction as to the weight to be accorded the government's interest in public and employee safety. While the Court has recognized the need for guidance in the drug testing area by granting certiorari in *National Treasury Union v. von Raab*, No. 86-1879 (Feb. 29, 1988), *amicus* urges that *von Raab* does not present the paramount issue of public safety. That issue is central to *Burnley*, and review in this case is essential to address public safety as a basis for testing.

II. REVIEW IS NECESSARY TO RESOLVE A DIRECT CONFLICT AMONG THE CIRCUIT COURTS

The Court should grant certiorari because the Ninth Circuit's decision is hopelessly inconsistent with the reasoning of five other circuit courts, and strays from the constitutional standards enunciated in this Court's prior opinions.

The Fourth Amendment protects individuals against searches and seizures that are "unreasonable." As this Court has defined that protection, it has become clear that:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.

Bell v. Wolfish, 441 U.S. 520, 559 (1979). This Court focuses on two factors in determining whether a given search is reasonable, and hence constitutional, under the Fourth Amendment: (1) the degree to which it intrudes upon the individual's legitimate privacy expectations, and (2) the importance of the government interests underlying the search. Only through careful balancing of these two opposing interests can the constitutional reasonableness of a particular search be determined.

A. The Ninth Circuit's Rejection Of The Government's Public Safety Justification Conflicts With The Opinions Of Other Circuits

In finding that the FRA's drug testing program was not justified by the government's interest in public safety, the Ninth Circuit clashed with the holdings of every other

circuit court which has addressed the issue. The Ninth Circuit properly stated that determining the reasonableness of such a program "requires 'balance[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion.'"⁵ However, in applying that standard, the Ninth Circuit "failed to engage in the balancing of interests required by [the Supreme] Court." 839 F.2d 575, 597 (Alarcon, J. dissenting).

All three circuit courts that reviewed drug screening in safety-sensitive industries prior to *Burnley* upheld the testing in light of compelling safety concerns. In *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976), the Seventh Circuit addressed the constitutionality of a drug testing program in a factual setting very similar to this case. *Suscy* involved rules of the Chicago Transit Authority requiring testing for alcohol or drug usage of operating employees immediately following a serious accident. The Seventh Circuit discussed the nature of the employees' Fourth Amendment rights, but found that those rights were outweighed by the employer's "paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs." *Id.* at 1267 (emphasis supplied).

In *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), the District of Columbia had instituted a program involving

⁵ Quoting *O'Connor v. Ortega*, 127 S.Ct. 1492 (1987). As a framework for applying the balancing test, the Ninth Circuit adopted the two-prong test established by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968), inquiring whether the drug testing was (1) "justified at its inception," and (2) "reasonably related in scope" to the problem being addressed.

the routine testing of certain school employees for drug use. The tests, administered as part of the employees' periodic physical examinations, were required for all bus drivers, mechanics, and bus attendants. In evaluating the constitutionality of the program, the Circuit Court balanced the intrusion on Fourth Amendment privacy interests against the government interest involved. The court acknowledged that "strong privacy interests" were implicated by the testing program, but noted the existence of "serious safety concerns on the other side of the balance." *Id.* at 340 (emphasis in original). In reconciling these interests, the court stated that "a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or others." *Id.* Given the existence of such a compelling interest in physical safety, the Circuit Court held the testing program to be reasonable, and thus constitutional.

Finally, the Eighth Circuit upheld the drug testing of prison employees in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987). There, the Iowa Department of Corrections adopted policies requiring correctional employees to submit to urine tests upon the request of Department officials. The court, while finding that such testing plainly implicated the employees' Fourth Amendment rights, upheld the drug screening "in light of the difficult burdens of maintaining safety, order and security that our society imposes on those who staff our prisons." *Id.* at 1306. In so holding, the Eighth Circuit was sensitive to the fact that "the institutional interest in prison security is a central one." *Id.* at 1308.

In contrast to these decisions, the Ninth Circuit in *Burnley* completely circumvented any discussion of the government's legitimate and compelling concern for public

safety. Yet it is the weight of that concern, when balanced against the individual's privacy interest, that establishes the constitutional reasonableness of the testing. The FRA regulations were promulgated in response to grave problems involving alcohol and drug abuse in the railroad industry. Employee use of drugs and alcohol in transportation poses serious hazards to the safety of co-workers and the general public. That fact was recognized by each of the other circuits to address this issue, as well as by the district court and the Railway Labor Executives' Association in this case.⁶

Notwithstanding the compelling nature of the government's concerns for public safety, the Ninth Circuit focused its analysis "solely on the degree of impairment of the workers' privacy interests." 839 F.2d 575, 597 (Alarcon, J. dissenting). The majority's analysis in *Burnley* is contrary to the holdings in *Suscy*, *Jones* and *McDonell*, and reflects the Ninth Circuit's de facto abandonment of the balancing test established by this Court in its numerous decisions addressing the reasonableness of searches under the Fourth Amendment.

B. The Ninth Circuit's "Particularized Suspicion" Standard Is Improper And Contradicts The Holdings Of Other Circuit Courts

In spite of its recognition that "[t]he Supreme Court has not yet determined whether . . . there must be individualized or particularized suspicion" to justify a search under the Fourth Amendment, the Ninth Circuit con-

⁶ The district court found that testing served the government's interest in "railway safety, safety for employees, and safety for the general public." The RLEA concedes that substance abuse poses serious threats to the safe operation of the nation's rail systems.

cluded that such suspicion "is essential to finding toxicological testing of railroad employees justified at its inception." That conclusion is inconsistent with principles of law established by this Court, and contradicts the holdings of the other circuits that have addressed the issue.

1. The Ninth Circuit standard is inappropriate in light of prior Supreme Court rulings

Under prior decisions of this Court, a search is justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence [of the suspected impropriety]." *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). The Ninth Circuit noted that the Court has expressly reserved the question of whether particularized suspicion is an irreducible minimum under the "reasonable grounds for suspecting" standard. Nevertheless, in the very next sentence of its opinion, the Ninth Circuit adopted the particularized suspicion standard, describing such suspicion as "essential" to the permissible testing of railroad employees. The court then concluded that "accidents, incidents or rule violations" cannot, in and of themselves, justify the imposition of drug testing.

Not only does the Ninth Circuit's opinion proclaim a new standard for drug testing, it simultaneously announces that serious accidents and rule violations cannot form a constitutionally adequate basis upon which to base a testing program. Thus, under *Burnley*, drug testing is prohibited even though a linkage between employee drug use and serious accidents exists *unless* the employer can demonstrate a basis for suspecting drug usage by each individual to be tested. The Ninth Circuit ruled that such a prerequisite to testing "poses no insuperable burden on the

government." On the contrary, requiring particularized suspicion prior to testing effectively precludes timely discovery of drug use.⁷ Such a requirement severely limits the ability of employers to identify and remedy drug problems and hampers efforts to prevent the recurrence of serious accidents and fatalities.⁸

2. Other circuits have consistently upheld testing in the absence of particularized suspicion

Prior to *Burnley* all five of the circuit courts that addressed the propriety of drug testing in the absence of particularized suspicion upheld such testing as "reasonable." In *Suscy*, the Seventh Circuit viewed involvement in a serious accident sufficient to warrant testing in light of compelling safety interests. In *Jones*, where the school system's drug screening was conducted as part of the routine physical examination given each employee, the testing was upheld. Similarly, in *McDonell*, the Eighth Circuit found testing constitutional despite the fact it required no showing of particularized suspicion.

Two other circuit courts have upheld drug testing programs without requiring individualized suspicion. In

⁷ This is especially true where, as in the railway industry, employees often work in isolation from others and are not subject to frequent supervisory observation. Further, as the district court noted in its opinion, "the disappearance or loss of [evidence of drug usage]" poses a serious problem where testing is not conducted immediately following an accident.

⁸ The Ninth Circuit concluded that testing was not "reasonably related" to railway safety since tests by themselves cannot conclusively establish current impairment. However, the FRA testing guidelines clearly demonstrate that the results of drug tests are considered *along with other relevant data* in making the ultimate determination of impairment. In fact, the notice to employees concerning testing recognizes that blood tests only provide information "pertinent to current impairment."

Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986), the Third Circuit reviewed the constitutionality of New Jersey Racing Commission regulations requiring racing officials, jockeys, trainers and grooms to submit to breathalyzer and urine testing at the direction of the State Steward. Those regulations were part of a comprehensive regulatory scheme designed to assure public confidence in the integrity of the racing industry. The Third Circuit found the racing industry to be a "heavily regulated industry," and therefore applied the standard of reasonableness necessary to justify an administrative search. Under that standard, the court upheld the regulations as based on a strong state interest accompanied by the reduced privacy expectation of those persons employed in the industry.⁹

In *National Treasury Union v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, No. 86-1879 (Feb. 29, 1988),

⁹ The Ninth Circuit struggled to distinguish the facts of *Shoemaker* from the instant situation, emphasizing that jockeys, as persons employed in the "regulatory activity," were "the principal regulatory concern." "In contrast," the court stated, "the extensive regulation of the railroad industry . . . has always been geared to assuring the safety and proper maintenance of equipment and facilities." The unpersuasiveness of this distinction is evident from the government's long tradition of regulating the conduct of railroad workers to promote public safety. As the dissent correctly noted, "the activities of railway personnel are closely regulated to promote safety." Indeed, "an idle locomotive . . . is harmless. It becomes lethal when operated negligently by persons." 839 F.2d at 593. (Emphasis added.)

An additional distinction made by the Ninth Circuit related to the railway employees' expectations of privacy. While the jockeys in *Shoemaker* were subject to extensive regulation and thus possessed diminished expectations of privacy as to their physiological conditions, the Ninth Circuit found that railway employees' privacy expectations were not similarly diminished.

(Continued on following page)

the Fifth Circuit Court of Appeals expressly rejected the argument that individualized suspicion is constitutionally required for the drug testing of employees. There, the United States Customs Service adopted regulations requiring employees to submit to urine testing prior to transfer into sensitive drug enforcement positions. The Customs Service argued that the testing was justified to preserve the Service's integrity in drug enforcement operations. Finding the testing "incident to the primary business of [the Customs Service]" and "necessary to carry on [that] business," the Fifth Circuit found the testing program was warranted. In balancing the employees' privacy interests against the interest in institutional integrity, the court refused to adopt a standard of individualized suspicion. The court found that the Customs Service's compelling interest in uncovering drug usage was such that "the balance of interests precludes insistence upon 'some quantum of individualized suspicion'." *Id.* at 176-177, quoting *Delaware v. Prouse*, 440 U.S. 648 (1979).

(Continued from previous page)

This distinction must also fail. The regulations provided railway employees with explicit notice of accident testing procedures, and of the right to blood testing to "provide information pertinent to current impairment." Given the railroad industry's historical emphasis on safety, and the specific notice of these regulations, the railway employees' expectations of privacy were identical to those found to be diminished in *Shoemaker*.

Accordingly, as in *Shoemaker*, the administrative search standard should have been applied. In fact, since the regulatory scheme in *Burnley* arises out of compelling public safety concerns not present in the horse racing industry, the administrative search standard is more appropriate here than in *Shoemaker*. To allow drug testing of jockeys while prohibiting testing of railroad employees would be absurd in light of the much greater threat to public safety present in the transportation industry.

III. REVIEW SHOULD BE GRANTED TO ADDRESS IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

As the facts of *Burnley*, *Jones*, *McDonell* and *Suscy* demonstrate, drug use poses serious health and safety hazards for employees and the public. The scope of drug abuse in this country has expanded greatly, rendering employee intoxication one of the foremost causes of workplace accidents. Employers and regulatory agencies are turning increasingly to drug testing as a means of identifying substance abuse and responding to critical safety and health problems. At the same time, the technology of drug screening has raised legitimate concerns about intrusions upon personal privacy, making the permissibility of employee testing the subject of widespread litigation and debate.

This controversy results, in part, from the fact that drug testing in safety-sensitive industries has never been addressed by this Court. The conflicting decisions of lower courts that have grappled with this issue illustrate both its growing importance and the need for authoritative guidance. In the absence of such guidance, the right to test employees and the manner in which testing can be implemented often correspond more closely to the jurisdiction in which testing takes place than to the proper balancing of safety and privacy concerns. For example, while safety concerns have been recognized as adequate justification for employee drug testing in most of the cases addressing

the issue,¹⁰ those concerns have been found inadequate by other courts in even the most compelling settings.¹¹

The two central issues that underlie the courts' inability to resolve drug testing disputes are the weight to be accorded health and safety concerns and the adequacy of generalized suspicion to justify employee testing. In *Suscy*, *McDonell* and *Jones*, the courts found that the weight of the employer's interest in employee and public safety was adequate to justify testing, even though no individualized suspicion was demonstrated. Significantly, these issues are at the core of the dispute between the majority and dissent in *Burnley*, and are thus properly framed for resolution by this Court.¹² Review of *Burnley* would

¹⁰ Drug testing programs have been upheld by courts in a variety of contexts. The most notable of these decisions include *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (municipal utility employees); *Burka v. New York City Transit Authority*, No. 85 Civ. 5751 (S.D.N.Y., Feb. 1, 1988) (mass transit workers); and *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C.App. 1985) (police officers).

¹¹ See, e.g., *National Federation of Federal Employees v. Carlucci*, No. 86-0681 (D.D.C. Mar. 1, 1988) (pilots, air traffic controllers, and mechanics); and *Lovvorn v. City of Chattanooga*, 647 F. Supp. 879 (E.D. Tenn. 1986) (firefighters). The Eighth Circuit's opinion in *McDonell* reversed the district court's holding that testing of correctional employees violated the Fourth Amendment.

¹² Indeed, the magnitude of the issues in this case—and the flawed nature of the Ninth Circuit's analysis of drug testing programs—is underscored by that court's recent decision in *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087 (9th Cir. 1988). There, in finding that the implementation of a private sector, post-accident testing

allow this Court to resolve issues of critical constitutional import and provide needed guidance to the lower courts.

(Continued from previous page)

program violated a collective bargaining agreement, the court relied upon Fourth Amendment principles:

Our analysis here is aided by reference to fourth amendment doctrine. [Burlington Northern] is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment. However, the focus of our inquiry—both under the fourth amendment and an implied provision of a collective agreement—is the expectation of privacy of those who will be subject to urine testing.

Id. at 1092.

Reasoning that a railroad worker's expectations of privacy under a collective bargaining agreement "are related" to privacy expectations under the Fourth Amendment, the court found *Burnley's* requirement of individualized suspicion to be "readily applicable":

Although the source of the invasion is different, the privacy interest is the same. In the case of urine testing programs the Constitution draws a line between those programs based on particularized suspicion and those based on generalized suspicion. [Citing *Burnley*]. The former are permissible; the latter are not.

Id. at 1093.

The Ninth Circuit, without citing any supporting authority, applied Fourth Amendment standards to drug testing in the private sector. Further, it expressly adopted *Burnley's* particularized suspicion standard. As the dissent properly pointed out, this ruling goes far beyond the well accepted limitation of Fourth Amendment principles to "governmental intrusions."

Review of *Burnley* is critical not only because of its immediate impact on public sector employers, but also because of the clear implications for all employers should the Ninth Circuit be allowed to extend its analysis—as it already has in *Burlington Northern*—to employers in the private sector. By reversing *Burnley*, the Court can clarify the scope of Fourth Amendment protections and the importance of safety concerns in justifying drug testing programs. Further, by resolving the issues in *Burnley* in the manner *amicus* urges, the Court, in effect, would correct the Ninth Circuit's unwarranted application of Fourth Amendment principles to private sector, post-accident testing.

IV. THE COURT SHOULD GRANT REVIEW TO PROVIDE GUIDANCE REGARDING IMPORTANT ISSUES NOT RAISED BY VON RAAB

CELC urges the Court to grant review notwithstanding that certiorari has been granted in the *von Raab* case. The issues in *von Raab* are narrowly focused upon the interests of a governmental agency, the Customs Service, to assure the honesty and integrity of its operations in dealing with drug smuggling. Testing in that case included *all* employees who sought promotions to drug enforcement positions. In contrast, the drug testing in *Burnley* is tied to the occurrence of serious accidents, and thus focuses upon the more universal issue of public safety and the safe performance of vital services. The far-reaching impact of the drug testing in *Burnley*, designed to assure safety in an industry inextricably interwoven throughout our business and private lives, provides the Court with an excellent opportunity to give guidance on a matter of great legal and societal importance.¹³

Indeed, by considering both *von Raab* and *Burnley*, this Court can resolve important and complementary issues which have taken center stage in Fourth Amendment search and seizure litigation. Courts have been inundated with legal challenges to drug testing programs, and guidance

¹³ *von Raab* and related decisions like *McDonell* and *Shoemaker* fall within a category of cases involving security and corruption in regulated entities. In contrast, *Burnley* involves safety-sensitive jobs which, if performed while under impairment, can result in fatalities or serious injuries. Regardless of the outcome in *von Raab*, the important and far-reaching issue of public endangerment in safety-sensitive industries would not be resolved. Given the compelling nature of the safety interest in *Burnley*, review would allow the Court to clearly address this critical issue.

is greatly needed to assure compliance with constitutional requirements and minimize unnecessary litigation. Given the difficult process of balancing conflicting interests under the Fourth Amendment, clarification as to the weight of safety concerns under the Court's reasonableness test is highly desirable.

It is urged that the Court not hold this matter in abeyance pending the outcome of *von Raab*, as to do so would result in the loss of an important opportunity to provide authoritative direction in an area permeated with uncertainty and confusion. Accordingly, CELC requests that the Court grant review of the petition herein and give full consideration to the issues raised, together with those already before the Court in *von Raab*.

V. CONCLUSION

The Court should grant the petition for certiorari in order to resolve the conflict in the circuits and affirm that legitimate safety concerns justify post-accident drug testing in the absence of individualized suspicion.

Dated: April 15, 1988

Respectfully submitted,

VICTOR SCHACHTER

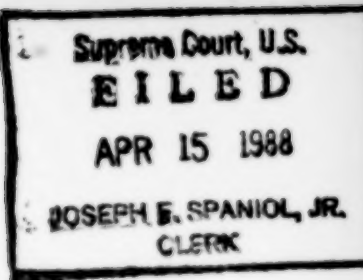
Counsel of Record

LAWRENCE HECIMOVICH

SCHACHTER, KRISTOFF, ROSS

SPRAGUE & CURIALE

Attorneys for Amicus Curiae



No. 87-1555

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

James H. Burnley IV, Secretary,
Department of Transportation, et al.,
Petitioners

v.

Railway Labor Executives' Association, et al.

**BRIEF AMICUS CURIAE IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

Suzanne B. Gifford
General Counsel

Richard A. Katzman
Acting Senior Assoc. Counsel

Southern California Rapid
Transit District
425 South Main Street
Los Angeles, California 90013
(213) 972-6742

TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION	1
II. INTEREST OF THE AMICUS CURIAE	1
III. SUMMARY OF ARGUMENT	5
IV. ARGUMENT	7
The Regulations Of The Federal Railroad Administration Are Constitutional Because Railroad Train Crew Members Do Not Have A Reasonable Expectation of Privacy in Blood and Urine Specimens Following Collisions and Fatalities	
V. CONCLUSION	14
APPENDIX	18

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Amalgamated Transit Union, et al. v. Southern California Rapid Transit District</i> , Case Number C 628 562 (Los Angeles Sup. Ct.)	4
<i>Cady v. Dombrowski</i> , 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed. 2d 706 (1973)	10
<i>California v. Carney</i> , 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed. 406 (1985)	13
<i>Camara v. Municipal Court</i> , 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967)	8
<i>City of San Jose v. Superior Court</i> , 166 Cal.App.3d 695, 212 Cal. Rptr. 661 (1985)	11
<i>De Vera v. Long Beach Public Transportation Co.</i> , 180 Cal.App.3d 782, 225 Cal.Rptr. 789 (1986)	12
<i>Division 241 Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir. 1976)	3, 16
<i>Katz v. United States</i> , 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967)	8
<i>Lang v. Southern California Rapid Transit District</i> , Case Number C 625 916 (Los Angeles Sup. Ct.)	4
<i>Lopez v. Southern California Rapid Transit District</i> , 49 Cal.3d 780, 221 Cal.Rptr. 840, 710 P.2d 907 (1985)	1, 2, 11
<i>McDonnell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987)	3

TABLE OF AUTHORITIES (Cont'd)

Cases	Page(s)
<i>McMorris v. Alioto</i> , 567 F.2d 897 (9th Cir. 1978)	14
<i>Nat'l Treasury Employees Union v. Von Raab</i> , 816 F.2d 170 (5th Cir. 1987), <i>cert. granted</i> , Case Number 86-1879 (2-29-88)	3, 4, 5, 13, 14
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed. 2d 720 (1985)	8
<i>New York v. Class</i> , 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed. 2d 889 (1968)	8, 9, 10
<i>Riojas v. Southern California Rapid Transit District</i> , Case Number C 647 557 (Los Angeles Sup. Ct.)	4
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir. 1986), <i>cert. denied</i> , — U.S. —, 107 S.Ct. 577, 93 L.Ed. 2d 580	3, 10, 13
<i>Stolpe v. Southern California Rapid Transit District</i> , Case Number CV 87-07734 KN (C.D. Cal.)	4
<i>Taxpayers Watchdog, Inc. v. Stanley</i> , Case Number 86-2455 (D.D.C. 1986), <i>aff'd</i> , 819 F.2d 294 (D.C. Cir. 1987)	2
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968)	8
<i>United States v. Chadwick</i> , 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977)	8, 9, 10

TABLE OF AUTHORITIES (Cont'd)

Cases	Page(s)
<i>United States v. Greenberg</i> , 334 F.Supp. 364, 19 A.L.R. Fed. 731 (W.D. Pa. 1971)	14
<i>United States v. Knotts</i> , 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed. 2d 55 (1983)	8
<i>United States v. Martell</i> , 654 F.2d 1356 (9th Cir. 1981)	14
Statutes	
Cal. Public Utilities Code §30000 et. seq.	1
Cal. Civil Code §2100	2, 11
Cal. Labor Code §1721	1
Other Authorities	
50 Fed. Reg. 31541 (1985)	12
49 C.F.R. §391.41(3)	13
49 C.F.R. §391.41(12)	7, 13
49 C.F.R. §391.41(13)	13
49 C.F.R. §391.43	7, 13
Restatement (Second) of Torts §314A (1979)	12
United States Supreme Court Rule 36.4	1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-1555

James H. Burnley IV, Secretary,
Department of Transportation, et al.,
Petitioners

v.

Railway Labor Executives' Association, et al.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. INTRODUCTION

The amicus curiae, Southern California Rapid Transit District, supports the Secretary's and Administrator's (the Government) petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The District's brief is submitted pursuant to United States Supreme Court Rule 36.4. The Court should grant the petition to review the judgment of the court of appeals, which enjoined enforcement of regulations promulgated by the Federal Railroad Administration requiring and permitting toxicologic tests of railroad employees involved in collisions and in other specified circumstances.

II. INTEREST OF THE AMICUS CURIAE

The Southern California Rapid Transit District is a political subdivision of the State of California. Cal. Pub. Util. Code §30000 et seq.; Cal. Labor Code §1721. It is engaged as a common carrier in the business of transporting members of the general public in and about Los Angeles County. *Lopez v. Southern California Rapid Transit District*, 49 Cal.3d 780, 784, 221 Cal.Rptr. 840, 841, 710 P.2d 907 (1985). The District operates the largest all-bus mass

transit system in the United States.

The scale of the District's operations is enormous; and the environment in which it operates is daunting. The twenty-three hundred bus fleet is part of a surface transportation system rapidly approaching its physical limits. *Taxpayers Watchdog, Inc. v. Stanley*, Case Number 86-2455 (D.D.C. 1986), *aff'd*, 819 F.2d 294 (D.C. Cir. 1987). Los Angeles' core will shortly face daily gridlock. *Id.* The District operates as many as one hundred buses per hour on a single street during peak periods. *Id.* "Against this nightmarish backdrop of traffic congestion", *id.*, the District carries 1.3 million passengers each day, nearly one-half billion people each year. Five thousand bus operators are employed to accomplish this behemoth task.

The standard of care with which the District must transport its passengers, as with most common carriers, is the highest. Bus operators must "'use the utmost care and diligence for safe carriage [of passengers] . . . and must exercise to that end a reasonable degree of skill.'" *Lopez, supra*, 49 Cal. 3d at 785, 221 Cal.Rptr. at 842, *quoting*, Cal. Civ. Code §2100. The District must "do all that human care, vigilance, and foresight reasonably can do under the circumstances." *Id.* It is precisely from this highest legal standard of care, (which the District shares with other transportation modalities such as railroads), grafted upon the massive bus network with its daily import to the public's safety, that the District's vital interest in the outcome of the instant case is derived.

Along with the railroad and airline industries, the District experienced a crisis in drug abuse by its employees which reached its zenith in 1986. Buses were involved in several spectacular crashes, injuring scores of passengers and killing one. The bus operators were found to have illicit drugs coursing through their systems. The resulting widespread negative publicity spread as far as New York City, and saturated the Southern California area, shaking public confidence in the District's ability to provide an

efficient transit service. Aside from the demonstrated endangerment of the public's safety, the District's employees were, themselves, justifiably concerned over the abuse of controlled substances by their fellow employees and the impairment of their right to a safe and drug-free workplace.

In response to this public outcry, and to meet its obligation to provide a healthy working environment, the District strengthened its drug and alcohol abuse policy, in large part tracking the Federal Railroad Administration's regulations at issue in the case at bench. In summary terms, the District's policy requires toxicologic urinalysis upon one of two triggering events. The first is "reasonable suspicion"; that is, when a supervisor articulates facts from which a reasonable suspicion arises that the bus operator possesses, is under the influence of, or is impaired by, controlled substances or alcohol.

The second trigger is a set of incidents intended to control supervisorial discretion when ordering a urinalysis. When there is a vehicle collision with a specified threshold of property damage or when there is a personal injury or fatality, bus operators are required to submit a urine sample for analysis.

Absent this Court's plenary review of this case, the District's drug and alcohol abuse policy and, quite frankly, that of many public transit operators throughout the United States, will be thrown into a legal quandary. Aside from the direct impact of the Ninth Circuit's opinion on the District's policy, the conflict between that opinion and the decisions of several United States Courts of Appeals, *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976); *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, _____ U.S. _____, 107 S.Ct. 577, 93 L.Ed. 2d 580 (1986); *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, Case Number 86-1879 (2-29-88), affords a blurred line, at best, to follow.

The amicus' interest in this Court's review is particularly heightened by the grant of certiorari to review the decision this term, of the United States Court of Appeal for the Fifth Circuit. *NTEU v. Von Raab, supra*. The *Von Raab* case, as explained in the Government's petition, will not provide adequate guidance for the courts and the transportation industry. *Petition for Writ of Certiorari* at 14. The District's efforts to provide safe mass transit and a drug-free workplace, would be particularly vulnerable given the continued viability of the Ninth Circuit's judgment. Transit operators in all jurisdictions would still lack clear constitutional parameters within which to continue drug abatement policies. The clear and present danger to public safety by railroad employees, bus operators, and airline pilots who use illegal drugs, does not afford the luxury of time for lower courts to wrestle with issues left unresolved by *Von Raab*.

Part of the District's interest in this case arises from the fact that it is a party to a case in the United States District Court for the Central District of California, in which the same issue is presented to the court; that is, the constitutional validity of a drug and alcohol abuse policy patterned upon the regulations of the Federal Railroad Administration. *Stolpe v. Southern California Rapid Transit District*, Case Number CV 87-07734 KN (C.D. Cal.). The interest of the District also arises from the fact that it is a party to three cases in the Superior Court of the State of California, in which this same issue is presented to the court. *Amalgamated Transit Union, et al. v. Southern California Rapid Transit District*, Case Number C 628 562 (Los Angeles Sup. Ct.); *Riojas v. Southern California Rapid Transit District*, Case Number C 647 557 (Los Angeles Sup. Ct.); *Lang v. Southern California Rapid Transit District*, Case Number C 625 916 (Los Angeles Sup. Ct.).

The District is vitally interested in this Court's granting of the Government's petition for writ of certiorari, because the entire subject is ripe for resolution as is evidenced by: the

nationally recognized problem of drugs in the workplace, and the granting of the certiorari petition in the the case now pending, *NTEU v. Von Raab, supra*, which addresses somewhat different aspects of this subject. The public's interest in safe modalities of mass transit demands that the attempts of transit operators to address and curb the use of controlled substances and alcohol at work, not be left in a legal shadow.

III. SUMMARY OF ARGUMENT

This Court should grant the Government's petition for writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, for two reasons. Principally, invalidation of the Federal Railroad Administration's regulations governing toxicologic testing of railroad crews, has thrown the state of the law in this area of national concern, into disarray, particularly in light of the conflicting decisions from other circuits.

The negative impact, or at least the uncertainty, created by the Ninth Circuit's majority opinion, bodes ill for the assurance and provision of safe mass transit to the public. The railroads, airlines, and bus carriers, and ultimately, their passengers, are all potential victims of this unfounded judgment. The crisis of illicit drugs in America, particularly its infusion in the workplace, should not be permitted to run its course in the "laboratories" of the transportation industry, before securing constitutional interpretation from this Court. The writ should be granted, for reason of this dire need and, because the opinion of the circuit court is in direct conflict with the opinions of the other circuits. Uncertainty in the law is ill afforded in this vital area of public concern.

The search and seizure entailed in the challenged regulations are analyzed under the Fourth Amendment to the United States Constitution. The court of appeals inaccurately weighted the two critical factors in the balancing test. The compelling governmental interest in rail safety (and, in general, safe mass transit), far outweighs the

drastically reduced privacy expectation of railroad crew members. Thus, an individualized suspicion of drug or alcohol use, is not the sole and necessary antecedent to a toxicologic test. Instead, measuring the reasonableness of the search in light of all the circumstances, the gravity of the government's interest here permits other standards, such as exist in the Federal Railroad Administration's regulations, to control the searcher's discretion (in lieu of a reasonable suspicion).

This Court's opinions have conclusively established that a private citizen who operates any motor vehicle, even a motor *home*, has a sharply diminished expectation of privacy given both the mobility of a motor vehicle and the intense and pervasive governmental regulation of such vehicles. The resulting diminution in the expectation of privacy not only applies to an individual employed for the very purpose of operating a vehicle such as a train, bus, or plane; it applies with synergistic force to one who so dramatically affects the public's safety as the engineer, bus operator, or pilot who is carrying innocent passengers.

The Court of Appeals for the Ninth Circuit failed to consider the nature of a railroad crew member's job which, as with a bus operator or airline pilot, includes accident investigation and accident prevention. This quintessential factor which serves to reduce the expectation of privacy to its lowest ebb, differentiates the train crew member or other mass transit operator from the ordinary motorist and motor home occupant, (the latter also hold reduced privacy expectations), by the very fact that a principal part of the crew member's job duties is the prevention and *investigation* of collisions.

In order to thoroughly investigate a "human factors" accident, (one in which human error may have been a contributing cause), both for purpose of ascertaining the cause of the particular collision and to hopefully prevent a recurrence, the variable of illicit drug use or alcohol abuse must be ruled out. As the United States Department of

Transportation has recognized in establishing medical standards for over-the-road drivers, 49 C.F.R. §391.41(12) (1987), the sole means for detecting current drug use is a serologic test. See, 49 C.F.R. §391.43 (form includes laboratory's serologic data). The Federal Railroad Administration acted with reason and in concordance with Fourth Amendment parameters, by requiring toxicologic tests of railroad crew members involved in train accidents. The judgment of the court of appeals failed to consider this important governmental purpose which formed the foundation for the regulations.

The need for review by certiorari is patent in view of the conflicting opinions from other circuit courts, and in light of the partial completion of the legal tableau by this Court's forthcoming decision in the case in which a petition for writ of certiorari has been granted. To leave the remainder of the canvas unfinished, would be ill advised in light of this Nation's struggle with the refractory problem of drug abuse. The potential for disaster is nowhere more inviting than in the transportation industry. The time for decision by this Court is not only ripe; it is vitally needed to remove the cloud of uncertainty that has settled upon transit operators from the anomalous decision by the court of appeals. The Government's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit should be granted.

IV. ARGUMENT

The Regulations Of The Federal Railroad Administration Are Constitutional Because Railroad Train Crew Members Do Not Have A Reasonable Expectation of Privacy In Blood and Urine Specimens Following Collisions and Fatalities.

This case presents for resolution the validity of the Federal Railroad Administration's regulations, (requiring and permitting toxicologic tests of railroad crew members), under the Fourth Amendment to the United States Constitution. The dispositive issue, "is whether or not [the] search

or seizure is reasonable under all the circumstances." *United States v. Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed. 2d 538 (1977) (citation omitted). This test of reason in Fourth Amendment analysis, does not demand a warrant in all circumstances, *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967); nor is there an irreducible minimum of a reasonable suspicion required in every instance. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed. 2d 720 (1985). The standard of reason when applied to a search and seizure, instead, is measured by "'balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" [Citation omitted]." *New York v. Class*, 475 U.S. 106, 116, 106 S.Ct. 960, 967, 89 L.Ed. 2d 81, 92 (1986), quoting, *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

When this measure is applied to the Federal Railroad Administration's regulations, it is readily apparent that the particular circumstances which distinguish the occupation of railroad crew member from the general population, (operation of a vehicle with concomitant duties to investigate and prevent accidents), lead inexorably to the conclusion that the required submission of blood or urine samples following a collision or loss of life, is eminently reasonable. This administrative search passes constitutional muster.

The Fourth Amendment's reach is not a mere litmus test turning upon the presence or absence of a physical intrusion in a particular enclosure or zone. *United States v. Knotts*, 460 U.S. 276, 280, 103 S.Ct. 1081, 1084, 75 L.Ed. 2d 55 (1983), quoting, *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed. 2d 576 (1967). The place to be searched is not dispositive, for it is people and not places which are the subject of the Fourth Amendment's protective cloak. *Katz v. United States*, *supra*. However, the fact that the submission of body fluid specimens is the result of vehicle operations, strongly influences the balancing test.

This Court has repeatedly observed that a motor vehicle

has a unique status in Fourth Amendment analysis. While a link has not yet been drawn to rail cars, the factors from which the motor vehicle derives its status will be seen to correspond with rolling stock. The decision of the Court of Appeals for the Ninth Circuit, the review of which is sought in the instant petition, applies with equal force to vehicles such as buses, interurban mass transit rail vehicles, and airplanes. The factors governing the treatment of automobiles in Fourth Amendment cases, are intertwined throughout the transit industry, and bear upon the approach to the present analysis.

[T]his Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts.

United States v. Chadwick, 433 U.S. at 12, 97 S.Ct. at 2484.

This treatment of motor vehicles has been premised in part upon their inherent mobility, *id.*, a factor indisputably common to rail cars, buses, and airplanes.

The Court has recognized that the physical characteristics of an automobile and its use result in a lessened expectation of privacy therein:

'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.' [Citation omitted].

New York v. Class, 475 U.S. at 112-13, 106 S.Ct. at 965, 89 L.Ed. 2d at 89.

A rail car, bus, and plane not only share the ready mobility of an automobile; it is clear that they are never used as one's home in the case of public transit; nor does

the rail crew member, bus operator, or airline pilot maintain the type of personal effects therein such as are reposed in the home. The openness to public view and the primary transportation function are two factors this Court has identified in creating the automobile exception to the Fourth Amendment's warrant requirement. These factors are apposite with equal force to rail cars, buses, and airplanes, and thus form the basis for assessing the regulations of the Federal Railroad Administration in terms of the automobile exception.

Yet another factor enunciated in the decisions concerning search and seizure of automobiles, is present in the instances of rail cars, buses, and airplanes. This critical factor was held to be absent by the court of appeals in the case at bench, without consideration of the very cases which identified the element. That is, "automobiles are justifiably the subject of pervasive regulation by the State. *Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy . . .*" *New York v. Class*, 475 U.S. at 113, 106 S.Ct. at 965, 89 L.Ed. 2d at 90 (emphasis added).

"States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways." *United States v. Chadwick*, 433 U.S. at 13, 97 S.Ct. at 2484, citing, *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed. 2d 706 (1973). Railroads are equally subject to extensive regulations in terms of the condition and manner in which crew members must operate. In the instance of this amicus, the State of California has not only provided for the usual pervasive regulation of bus operations upon the streets and highways; but more important to the Fourth Amendment expectation of privacy analysis, the operators, themselves, are at least as heavily regulated as the jockeys of *Shoemaker v. Handel*, *supra*.

It is true that the container, in this case a rail car, does

not, alone, limit or expand the legitimate privacy expectation of the person being searched. Nevertheless, if a member of the public who is driving an automobile has a reduced privacy expectation by virtue of the ready mobility and pervasive governmental regulation of that vehicle, then it is equally certain that employees who, themselves, are subject to intense regulation in the operation of readily mobile, pervasively regulated vehicles, have drastically reduced privacy expectations when receiving wages for operating the vehicles, and investigating and preventing accidents. In short, a railroad employee's privacy expectation is sufficiently reduced to permit incident triggers for toxicologic tests, rather than individualized suspicion, because both the employee and the industry are extensively regulated and the job duties include accident prevention and investigation.

The amicus, Southern California Rapid Transit District, is liable for injuries caused by employees' negligent acts or omissions in the operation of motor vehicles, notwithstanding sovereign immunity. *City of San Jose v. Superior Court*, 166 Cal.App.3d 695, 698, 212 Cal.Rptr. 661, 662 (1985). The standard of care to which bus operators, and in turn this amicus, is held, is extraordinarily high. The duty owed passengers requires the operator "to do all that human care, vigilance, and foresight reasonably can do under the circumstances." *Lopez v. Southern California Rapid Transit District*, 49 Cal.3d at 785, 221 Cal.Rptr. 840 at 842. As previously noted, this amicus and all common carriers including railroads, owe their passengers the highest standard of care which the law imposes, Cal. Civil Code §2100, and must "provide for the safe carriage of those specific individuals who have accepted the carriers' offer of transportation and have put their safety, and even their lives, in the carrier's hands." *Lopez*, 49 Cal.3d at 790, 221 Cal. Rptr. at 846. Thus, railroad crew members, bus operators, and airline pilots accept their jobs with the explicit understanding that their job duties not only entail

the operation of a pervasively regulated vehicle; but as well that as a carrier for hire, they are subjected to an exponentially greater scrutiny in terms of their operation of the respective transit modalities, than the private motor vehicle driver described in this Court's several decisions delineating the automobile exception to the Fourth Amendment's warrant requirement.

There is yet another obligation imposed upon common carriers which dramatically reduces a railroad crew member's, bus operator's, or pilot's, reasonable expectation of privacy. As described above, the standard of care in carrying passengers safely and without accident is the utmost. That other duty is to fully investigate a collision, once such an unfortunate event has transpired. That portion of the investigative process which seeks to identify the causes of a collision in order to prevent a recurrence, is a corollary of the duty to ensure passengers' safety. The Federal Railroad Administration has recognized this ancillary obligation in promulgating the regulations at issue. 50 Fed. Reg. 31541 (1985).

Once a collision has occurred, the common carrier has an independent duty to provide care for the victims. *Restatement (Second) of Torts* §314A (1979). A part of this obligation is, "to collect and preserve information concerning the [accident] for use by the carriers' passengers in future civil litigation." *De Vera v. Long Beach Public Transportation Co.*, 180 Cal.App.3d 782, 795, 225 Cal.Rptr. 789, 795 (1986). Bus operators, railroad crew members, and pilots, then, receive wages in part for fulfilling the carrier's duty to fully investigate collisions. A reasonable and necessary part of accident investigation is the determination whether human error was a contributing cause. The collection of a body fluid sample to rule out accidental impairment resulting from prescribed medication, or wrongdoing by ingestion of illicit drugs, is a critical aspect of the carrier's duty to safely transport passengers while exercising the very highest standard of care.

In the instance of bus operators, they have for years been employed on the condition they submit a serologic sample in order to receive the medical certificate required to operate a bus. See, 49 C.F.R. §§391.41(3), (12), and (13); 391.43 (form). Thus, there can be no reasonable expectation of privacy in the collection of a blood or urine sample following a traffic collision, merely because it has occurred at a different time than the biennial medical certification.

The crucial point is that as with the jockeys in *Shoemaker v. Handel, supra*, whose livelihood was dependent upon the public's confidence that a horse race was not influenced by chemicals; railroad crew members, bus operators, and airline pilots do not have a reasonable expectation of privacy in blood or urine samples following an accident, because their very job and the wages they receive are inclusive of assurance to the public that their carriage will be safe, and that accidents will be thoroughly investigated to ascertain their cause and to prevent their recurrence.

This Court should grant the Government's petition for a writ of certiorari, because the search called for in the challenged regulations was not considered in its proper context by the court of appeals; and this important matter of public safety will not be resolved by the decision in *National Treasury Employees Union v. Von Raab, supra*.

"These reduced expectations of privacy derive . . . from the pervasive regulation of vehicles capable of traveling on the public highways", *California v. Carney*, 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed. 2d 406, 413 (1985) (citation omitted); and this factor, applying as it does with equal force to a vehicle that operates on rails and crosses public highways, was rejected by the court of appeals. The minimally intrusive search countenanced by the Federal Railroad Administration's regulations, in light of the compelling government interest in providing efficient mass transit and safe operation of rail cars, buses, and airplanes, is not an embryonic legal development, but has been previously approved in areas where the precipitously reduced

expectation of privacy on the part of the person being searched did not even exist. Judge, and now Justice, Anthony Kennedy wrote for the court of appeals, that searches of persons entering a security-sensitive building need not be conducted upon warrant. *McMorris v. Alioto*, 567 F.2d 897, 899 (9th Cir. 1978). Justice Kennedy observed, while sitting on the court of appeals, that similar searches, using a magnetometer, had been judicially approved in the instance of passengers seeking to board an airplane. *Id.*, 567 F.2d at 901. Indeed, it would be skew line in the law, to permit passengers to be searched before boarding a plane in order to prevent hijacking, while precluding a post-accident search of the pilot to rule out the human error of alcohol use or drug abuse in order to prevent future loss of life and limb occasioned by a crash. Yet, in the context of the railroad, with its equal potential for destruction of human lives, that is precisely the aberration contemplated by the judgment of the court of appeals.

The type of administrative search which the Federal Railroad Administration has approved after an intensive two-year study, is not constitutionally different from the judicially approved, limited, administrative searches to assure public safety in buildings, *United States v. Martell*, 654 F.2d 1356, 1361 (9th Cir. 1981); or the administrative search approved in the pervasively regulated drug industry. *United States v. Greenberg*, 334 F.Supp. 364, 19 A.L.R. Fed. 731 (W.D. Pa. 1971). On balance, the regulations call for a search which is eminently reasonable under all of the circumstances.

The need for this Court's guidance is apparent both from the broad impact of the appellate court's decision, and the concomitant negative effect on the public's safety; and from the granting of the petition for writ of certiorari in *NTEU v. Von Raab*.

V. CONCLUSION

The petition for a writ of certiorari to review the judgment of the court of appeals should be granted. State courts and

lower federal courts have grappled for several years with the intractable problem of drug and alcohol use and government's power to banish this nemesis from the work environment. A body of judicial decisions had emerged which provided government entities with a fair degree of guidance.

In the instance of railroads and mass transit operators, it had become readily apparent that urgent measures were necessary to control the loss of life, limb, and property that followed from crew members' and bus operators' use of drugs and alcohol. The Federal Railroad Administration rationally responded to the crisis, with narrowly drawn regulations requiring and permitting investigatory toxicologic tests. The light cast by the judicial decisions on toxicologic tests, showed the regulations to be within the ambit of reasonable searches and seizures under the Fourth Amendment to the United States Constitution. The judgment of the United States Court of Appeals for the Ninth Circuit is dissonant from this body of state and federal court decisions.

Plenary review by this Court is appropriate, because the issue has wended its way through lower courts and the need for final resolution is critical. Public safety, and the threat posed to it by railroad and other common carriers whose employees have drugs or alcohol in their systems, do not admit of luxury of time to experiment with a judgment that proscribes constitutionally valid actions to eliminate drug and alcohol use by safety-sensitive employees.

The judgment clearly conflicts with the decision of the Courts of Appeals for the Third, Fifth, Seventh, and Eighth Circuits. The petition should be granted to resolve this conflict and to prevent further hazard to the public. The District has had great success in reducing drug and alcohol use in the workplace, by enforcement of a policy similar to the challenged regulations.

In September, 1985, eighteen point twenty-eight percent

(18.28%) of the District's bus operators tested, had illegal drugs in their systems while at work.^{1/} This alarmingly high proportion of bus operators transporting passengers while using drugs, declined to two point eighty-three percent (2.83%) by February, 1988.^{2/} The judgment of the court of appeals imperils the District's reduction of the dangers posed by bus operators who ingest illicit drugs and alcohol, in addition to the jeopardy in which rail safety has been placed. The District, of course, is not alone in this respect. Since at least 1976, following the decision in *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976), mass transit operators nationwide have implemented policies to eliminate drug and alcohol use by bus operators and train crew members. Review by this Court is imperative if carriers, their passengers, and the public at large, are to avoid the hazard posed by this decision.

The conflict between the Ninth Circuit's judgment and those of other courts of appeals, leaves this Nation to row a course between the Scylla of transit operators in the Ninth Circuit barred from enforcing sound drug abuse policies; and the Charybdis of railroads, mass transit carriers, and airlines across the country, all chilled in their response to the profound risk posed by crew members and drivers with drugs or alcohol in their systems.

¹Affidavit of Elia N. Hager, R.N. at 3 (attached to this brief).

²Affidavit of Elia N. Hager, R.N. at 4 (attached to this brief).

The Southern California Rapid Transit District urges the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

SUZANNE B. GIFFORD
General Counsel

By

Richard A. Katzman
Acting Senior Assoc. Counsel

April, 1988

APPENDIX
IN THE SUPREME COURT OF THE UNITED STATES

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, ELIA N. HAGER, R.N., being first duly sworn, do solemnly depose that:

1. I am a registered nurse in the State of California, employed by the Southern California Rapid Transit District for the purpose of administering the Alcohol and Drug Abuse Policy. I receive and maintain all laboratory reports of the urine specimens submitted by District employees pursuant to the Policy.

2. I have examined my records of all bus operators who received a urinalysis for controlled substances and alcohol, from the inception of the Policy on September 1, 1985, up to the present.

3. I found that in September, 1985, eighteen point twenty-eight percent (18.28%) of the bus operators who were tested, had one or more controlled substances in their systems, without a valid prescription. This proportion of operators driving buses with controlled substances in their bodies has steadily declined since the Policy's implementation, with the exception of a few aberrant months.

4. By the end of February, 1988, the percentage of bus operators who had a urinalysis indicating the presence of controlled substances, had dropped to two point eighty-three percent (2.83%).

Elia N. Hager, R.N., Affiant

Before me, the undersigned authority, appeared the person known to me as Elia N. Hager, R.N., who, being first duly sworn, deposed that the factual statements in this affidavit are true and correct.

Subscribed and sworn to before me, on this day of April, 1988.

Notary Public

(Seal)



No. 87-1555

FILED

JUL 19 1988

JOSEPH E. SEANIGL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

LAWRENCE M. MANN

Alper & Mann

Suite 811

400 First Street, N.W.

(202) 298-9191

W. DAVID HOLSBERY

Davis, Cowell & Bowe

100 Van Ness Avenue

San Francisco, California 94102

(415) 626-1880

HAROLD A. ROSS

General Counsel

Brotherhood of Locomotive

Engineers

The Standard Building

1370 Ontario Street

Cleveland, Ohio 44113

CLINTON J. MILLER, III

Assistant General Counsel

United Transportation Union

14600 Detroit Avenue

Cleveland, Ohio 44107

CHARLES FRIED

Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

Counsel for Petitioners

PETITION FOR A WRIT OF CERTIORARI

FILED MARCH 17, 1988

CERTIORARI GRANTED JUNE 6, 1988

TABLE OF CONTENTS

	Page
Relevant docket entries	1
Complaint	2
49 C.F.R. Part 219, Subpart A	8
June 4, 1982 Report prepared for Department of Transportation	17
Statement of Richard A. Lindblad and J. Michael Walsh, National Institute on Drug Abuse	59
March 1, 1985 letter from G.D. Bennett to R.E. Johnson	65
American Medical Association News Release, April 25, 1985	70
September 19, 1985 article from Express-News, San Antonio, Texas	91
Employee Assistance Program sponsored by United Transportation Union	94
Circular 182, Seaboard System R.R. Co.	119
Special Notice No. 5, Southern Pacific Transporta- tion Co.	122
February 10, 1986 letter from Jim Burnett to Edwin Meese III	125
March 21, 1986 letter from D.E. Thompson to John Riley	137
March 22, 1986 letter with attachments from James P. Finn to R.T. Bates	141
Timetable No. 7, Burlington Northern Railroad Co.	154
May 21, 1986 letter from Joseph W. Walsh to D.E. Thompson	163

	Page
May 22, 1986 letter from Joseph W. Walsh to R.T. Bates	169
News Release by Department of Transportation and laboratory and field evaluations	173
February 22, 1988 affidavit of Joseph W. Walsh ..	185
Order Granting Certiorari	204

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civ. No. 7958-CAL

DATE	PROCEEDING
October 31, 1985	Complaint filed
November 1, 1985	Temporary restraining order issued
December 9, 1985	Order granting petitioners' motion for summary judgment, denying respondents' motion for summary judgment, and dissolving temporary restraining order
December 10, 1985	Notice of appeal filed

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-2891

DATE	PROCEEDING
July 8, 1986	Case argued and submitted
February 11, 1988	Opinion filed, reversing judgment of the district court
March 4, 1988	Order staying mandate to and including April 2, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION NO. C 85 4958 CAL

RAILWAY LABOR EXECUTIVES' ASSOCIATION
400 FIRST STREET, N.W., WASHINGTON, D.C.

AND

UNITED TRANSPORTATION UNION
GENERAL COMMITTEE OF ADJUSTMENT,
THE SOUTHERN PACIFIC TRANSPORTATION COMPANY
SUITE 201, 1860 EL CAMINO ROAD
BURLINGAME, CALIFORNIA 94010

AND

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
GENERAL COMMITTEE OF ADJUSTMENT,
THE SOUTHERN PACIFIC TRANSPORTATION COMPANY
38750 PASEO PADRE PARKWAY
FREMONT, CALIFORNIA 94536

AND

BROTHERHOOD OF RAILROAD SIGNALMEN
601 WEST GOLF ROAD
MOUNT PROSPECT, ILLINOIS 60056
PLAINTIFFS

v.

ELIZABETH DOLE, SECRETARY OF TRANSPORTATION
400 SEVENTH STREET, S.W.
WASHINGTON, D.C.

AND

JOHN R. RILEY, ADMINISTRATOR
FEDERAL RAILROAD ADMINISTRATION
400 SEVENTH STREET, S.W.
WASHINGTON, D.C.
DEFENDANTS.

FILED OCT. 31, 1985

COMPLAINT

JURISDICTION

1. This is an action for judicial review of a final rule of the Federal Railroad Administration issued August 2, 1985 in FRA Docket No. RSOR-6. Specifically, this action challenges the Constitutionality of various provisions of said regulations which cover alcohol and drug use in the railroad industry.

2. This action arises under the Constitution and laws of the United States and plaintiff seeks a preliminary and permanent injunction, and a declaratory judgment.

3. Jurisdiction of this Court is based upon 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the U.S.; 45 U.S.C. § 431 *et seq.*; 5 U.S.C. §§ 701-706; 28 U.S.C. §§ 2201-2202; and 49 U.S.C. §§ 1653(c), 1655(f)(3)(A),(C).

VENUE

Venue of this Court is based upon 28 U.S.C. § 1391(e).

PARTIES

4. The plaintiff, Railway Labor Executives' Association (hereinafter "RLEA") is an unincorporated associa-

tion whose membership comprises all of the railway labor unions in the country which represent all crafts of railroad employees.

The plaintiff, United Transportation Union, General Committee of Adjustment for the Southern Pacific Transportation Company, is an unincorporated association and is the duly and exclusively designated and authorized representative on the Southern Pacific Railroad for collective bargaining under the Railway Labor Act, on behalf of the crafts of employees known as firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

The plaintiff, Brotherhood of Locomotive Engineers, General Committee of Adjustment for the Southern Pacific Transportation Company, is an unincorporated association as is the duly and exclusively designated and authorized representative on the Southern Pacific Railroad for collective bargaining under the Railway Labor Act, on behalf of the crafts of employees known as locomotive engineers.

The plaintiff, Brotherhood of Railroad Signalmen, is an unincorporated association and is the duly and exclusively designated and authorized representative for collective bargaining under the Railway Labor Act, on behalf of the craft of employees known as signalmen who are engaged in the installing, repairing or maintaining of signal systems.

5. The defendant Elizabeth Dole is the Secretary of Transportation (hereinafter "Secretary"). The defendant John R. Riley, is the Administrator of the Federal Railroad Administration (hereinafter "FRA"), which is an agency of the Department of Transportation.

FACTS

6. The regulations which are at issue in this litigation, will become effective on November 1, 1985 unless otherwise ordered by the Court. This rulemaking was initiated on October 30, 1983 by the issuance of an Advance Notice of Proposed Rulemaking, 48 F.R. 30723 (July 5, 1983). A Notice of Proposed Rulemaking was issued on June 5, 1984, (49 F.R. 24252 (June 12, 1984), and the Final Rule was issued on July 31, 1985, 50 F.R. 31508 (August 2, 1985). The plaintiffs' Petition For Reconsideration was denied on October 28, 1985.

7. The regulations prohibit the use, possession, or impairment by alcohol or drugs in the railroad industry, mandate post-accident toxicological testing after certain accidents and incidents, authorizes railroads to conduct breath and urine tests based on reasonable suspicion, provides that each railroad must adopt a policy to aid the identification of employees prone to alcohol or drug usage, authorizes pre-employment drug screens and revises the reporting of alcohol and drug involvement in train accidents.

8. Plaintiffs contend that the said regulations are unlawful in that;

(a) they are arbitrary, capricious and abusive of the Administrator's discretion, and otherwise not in accordance with law;

(b) they are in excess of, and in conflict with, statutory authority of the Administrator;

(c) coverage of only employees subject to the Hours of Service Act is discriminatory and violates the Fourth Amendment of the Constitution;

(d) the post-accident toxicological testing after certain accidents/incidents and certain rule violations, violates the Fourth and Fifth Amendments of the U.S. Constitution;

(e) the provisions which authorize the railroads to conduct breath and urine tests based on reasonable suspicion violate the Fourth and Fifth Amendments of the U.S. Constitution;

(f) the pre-employment drug screens pursuant to 49 C.F.R. § 219.501 *et seq.* and the implied consent provisions pursuant to 49 C.F.R. § 219.11 are not based upon a valid consent and violate both the Fourth and Fifth Amendments of the U.S. Constitution;

(g) they violate the Railway Labor Act (45 U.S.C. § 151 *et seq.*);

(h) they violate the Federal Rehabilitation Act of 1973 (29 U.S.C. §§ 791-794);

(i) they violate the Federal Railroad Safety Act of 1970, particularly 45 U.S.C. § 437(c);

(j) they violate the Administrative Procedure Act (5 U.S.C. §§ 701-706);

WHEREFORE, plaintiffs respectfully request that this Court;

1. enter an Order temporarily restraining the rules from going into effect;

2. preliminarily enjoin the enforcement or stay the effective date of the Administrator's rules, pending a decision of this case on the merits;

3. permanently enjoin and set aside the Administrator's rules;

4. declare that the post-accident toxicological testing, the testing permitted after certain rule violations and breath and urine tests based upon reasonable suspicion without probable cause are unconstitutional;

5. grant such other and further relief as the Court may deem appropriate.

ALPER, MANN & REISER

/s/ LAWRENCE M. MANN
LAWRENCE M. MANN

/s/ JEROME M. ALPER
JEROME M. ALPER
SUITE 1020
818 EIGHTEENTH STREET,
N.W.
WASHINGTON, D.C 20006
(202) 298-9191

/s/ BARRY JELLISON
BARRY JELLISON
DAVIS, COWELL & BOWE
9th FLOOR
100 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA
(415) 626-1880

Attorney for Plaintiffs

OF COUNSEL:

HAROLD A. ROSS
GENERAL COUNSEL
BROTHERHOOD OF LOCOMOTIVE
ENGINEERS
THE STANDARD BUILDING
1370 ONTARIO STREET
CLEVELAND, OHIO 44113

and

CLINTON J. MILLER, III,
ASSISTANT GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND, OHIO 44107

49 C.F.R. Part 219

Subpart A – General

§ 219.1 Purpose and scope.

(a) The purpose of this part is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.

(b) This part prescribes minimum Federal safety standards for control of alcohol and drug use. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part:

§ 219.3 Applications.

(a) Except as provided in paragraph (b) of this section, this part applies to –

(1) Railroads that operate rolling equipment on standard gage track which is part of the general railroad system of transportation; and

(2) Railroads that provide commuter or other short-haul rail passenger service in a metropolitan or suburban area (as described by Section 202(k) of the Federal Railroad Safety Act of 1970, as amended), specifically including any entity providing such service as a common carrier engaged in interstate or foreign commerce.

(b) Subparts D, E, and F do not apply to a railroad that employs not more than 15 employees covered by the Hours of Service Act (45 U.S.C. 61-64b).

§ 219.5 Definitions.

As used in this part –

(a) “Alcohol” means ethyl alcohol (ethanol). References to use or possession of alcohol include use or

possession of any beverage, mixture or preparation containing ethyl alcohol.

(b) [Reserved]

(c) “Controlled substance” has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR Parts 1301-1316).

(d) “Covered employee” means a person who has been assigned to perform service subject to the House [sic] of Service Act (45 U.S.C. 61-64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service.

(e) “Covered service” means service for a railroad that is subject to the Hours of Service Act (45 U.S.C. 61-64b), but does not include any period the employee is relieved of all responsibilities and is free to come and go without restriction.

(f) “Co-worker” means another employee of the railroad, including a working supervisor directly associated with a yard or train crew, such as a conductor or yard foreman, but not including any other railroad supervisor, special agent or officer.

(g) “Drug” means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

(h) “EAP Counselor” means a person or persons qualified by experience, education, or training to counsel persons affected by substance abuse problems and to evaluate their progress in recovering from or controlling such problems. An “EAP counselor” may be a qualified full-time salaried employee of the railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified physician designated

by the railroad to perform functions in connection with alcohol or drug abuse evaluation or counseling. As used in these rules, an EAP Counselor owes a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of the employee.

(i) "Field Manual" refers to the document described in § 219.19 of this part.

(j) "FRA" means the Federal Railroad Administration, U.S. Department of Transportation.

(k) "FRA representative" means the Associate Administrator for Safety, FRA, the Associate Administrator's delegate (including a qualified State inspector acting under Part 212 of this chapter), the Chief Counsel, FRA, or the Chief Counsel's delegate.

(l) "Hazardous material" means a commodity designated as a hazardous material by Part 172 of this title.

(m) "Impact accident" means a train accident consisting of a head-on collision, a rear-end collision, a side collision (including a collision at a railroad crossing at grade), a switching collision, or impact with a deliberately-placed obstruction such as a bumping post. The following are not impact accidents:

(1) An accident in which the derailment of equipment causes an impact with other rail equipment; and

(2) Impact of rail equipment with obstructions such as fallen trees, rock or snow slides, livestock, etc.

(n) "Independent" means not under the ownership or control of the railroad and not operated or staffed by a salaried officer or employee of the railroad. The fact that the railroad pays for services rendered by a medical facility or laboratory, selects that entity for performing tests under this part, or has a standing contractual relationship with that entity to perform tests under this part or perform other medical examinations or tests of railroad employees

does not, by itself, remove the facility from this definition.

(o) "Medical facility" means a hospital, clinic, physician's office, or laboratory where toxicological samples can be collected according to recognized professional standards.

(p) "Medical practitioner" means a physician or dentist licensed or otherwise authorized to practice by the state.

(q) "NTSB" means the National Transportation Safety Board.

(r) "Possess" means to have on one's person or in one's personal effects or under one's control. However, the concept of possession as used in this part does not include control by virtue of presence in the employee's personal residence or other similar location off of railroad property.

(s) "Reportable injury" means an injury reportable under Part 225 of this title.

(t) "Reporting threshold" means an amount specified in § 225.19(c) of this title, as adjusted from time to time in accordance with Appendix A to Part 225 of this title.

(u) "Supervisory employee" means an officer, special agent, or other employee of the railroad who is not a co-worker and who is responsible for supervising or monitoring the conduct or performance of one or more employees.

(v) "Train," except as context requires, means a locomotive coupled, with or without cars. (A locomotive is a self-propelled unit of equipment which can be used in train service.)

(w) "Train accident" means a passenger, freight, or work train accident described in § 225.19(c) of this title ("Rail equipment accident"), including an accident involving a switching movement.

(x) "Train incident" means an event involving the movement of railroad on-track equipment that results in a

casualty but in which railroad property damage does not exceed the reporting threshold.

[50 FR 31568, Aug. 2, 1985; 50 FR 38660, Sept. 24, 1985, as amended at 52 FR 10575, Apr. 2, 1987]

§ 219.7 Waivers.

(a) A person subject to a requirement of this part may petition the Federal Railroad Administration for a waiver of compliance with such requirement.

(b) Each petition for waiver under this section must be filed in the manner and contain the information required by Part 211 of this chapter.

(c) If the Administrator finds that waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any necessary conditions.

§ 219.9 Responsibility for compliance.

(a) A railroad that —

(1) Having actual knowledge, requires or permits an employee to go or remain on duty in covered service while in violation of § 219.101;

(2) Fails to exercise due diligence to assure compliance with § 219.101 by a covered employee;

(3) Willfully and with actual knowledge, requires an employee to submit to testing in reliance on § 219.301 without observance of the conditions and safeguards contained in Subpart D of this part;

(4) Fails to adopt or publish, or willfully and with actual knowledge fails to implement, a policy required by Subpart E of this part; or

(5) Fails to comply with any other requirement of this part; shall be deemed to have violated this part and shall be subject to a civil penalty as provided in Appendix A.

(b) For purposes of paragraph (a)(1) of this section, the knowledge imputed to the railroad shall be limited to that of a railroad management employee (such as a supervisor deemed an "officer," whether or not such person is a corporate officer) or a supervisory employee in the offending employee's chain of command.

(c) The "knowledge" referred to in this section and the penalty schedule (Appendix A) is knowledge of the applicable facts. Knowledge of this part, like other provisions of Federal law, is conclusively presumed.

[50 FR 31568, Aug. 2, 1985; 50 FR 38660, Sept. 24, 1985]

§ 219.11 Consent required; implied.

(a) Any employee who performs covered service for a railroad on or after February 10, 1986, shall be deemed to have consented to testing as required in Subpart C and D of this part; and consent is implied by performance of such service.

(b) Each such employee shall participate in such testing, as required under the conditions set forth in this part by a representative of the railroad or FRA.

(c) A covered employee who is required to be tested under Subpart C or D and who is taken to a medical facility for observation or treatment after an accident or incident shall be deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid sample taken by the treating facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such sample;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the treating facility on such sample; and

(3) The identity, dosage, and time of administration of any drugs administered by the treating facility prior to the time samples were taken by the treating facility or prior to the time samples were taken in compliance with this part.

(d) An employee required to participate in body fluid testing under Subpart C (post-accident toxicological testing) shall, if requested by the representative of the railroad, FRA, or the medical facility, evidence consent to taking of samples and their release for toxicological analysis under Subpart C by promptly executing a consent form, if required by the medical facility.

(e) Nothing in this part shall be construed to authorize the use of physical coercion or any other deprivation of liberty in order to compel breath or body fluid testing.

(f) Any railroad employee who performs service for a railroad on or after February 10, 1986, shall be deemed to have consented to removal of body fluid and/or tissue samples necessary for toxicological analysis from the remains of such employee, if such employee dies within 12 hours of an accident or incident described in Subpart C as a result of such event. This consent is specifically required of employees not in covered service, as well as employees in covered service.

[50 FR 31568, Aug. 2, 1985, as amended at 50 FR 45407, Oct. 31, 1985; 51 FR 3975, Jan. 31, 1986]

§ 219.13 Preemptive effect.

(a) Under Section 205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 434), issuance of these regulations preempts any State law, rule, regulation, order or standard covering the same subject matter, except a provision directed at a local hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

(b) FRA does not intend by issuance of these regulations to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

§ 219.15 Alcohol concentration in blood and breath.

(a) In this part, blood alcohol concentration (BAC) is expressed as a "percentage" weight to volume. For example, a BAC of ".04 percent" means that there is .04 gram (four hundredths of one gram) of alcohol in 100 milliliters of whole blood. This is the same quantity as "40 milligrams percent" (40 milligrams in 100 milliliters).

(b) For the purpose of determining blood alcohol concentration through an analysis of the breath, the amount of alcohol in one part of blood shall be presumed to equal the amount of alcohol in 2100 parts of an expired breath sample (by volume).

§ 219.17 Construction.

Nothing in this part —

(a) Restricts the power of FRA to conduct investigations under Section 208 of the Federal Railroad Safety Act of 1970, as amended; or

(b) Creates a private right of action on the part of any person for enforcement of the provisions of this part or for damages resulting from noncompliance with this part.

§ 219.19 Field Manual.

(a) Technical procedures for post-accident testing required by Subpart C of this part, recommended practice standards for breath and urine testing under Subpart D of this part, and related materials designed to assist the rail-

roads in establishing programs for control of alcohol and drug use are contained in the FRA Alcohol and Drug Field Manual which is revised from time to time by the Office of Safety, FRA.

(b) The Field Manual may be inspected at the Office of the Associate Administrator for Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590. The Field Manual may be purchased [sic] the National Technical Information Service, Order Department, 5285 Port Royal Road, Springfield, Virginia 22161.

§ 219.21 Information collection.

(a) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2130-0526.

(b) The information collection requirements are found in the following sections:

- (1) Section 219.203.
- (2) Section 219.205.
- (3) Section 219.207.
- (4) Section 219.209.
- (5) Section 219.211.
- (6) Section 219.213.
- (7) Section 219.301.
- (8) Section 219.303.
- (9) Section 219.305.
- (10) Section 219.307.
- (11) Section 219.309.
- (12) Section 219.401.
- (13) Section 219.405.
- (14) Section 219.407.
- (15) Section 219.501.
- (17) Section 219.503.

[50 FR 38660, Sept. 24, 1985]

PREVENTING ALCOHOL AND DRUG-RELATED ACCIDENTS ON RAILROADS

T.A. MANNELLO
J.A. PADDOCK

JUNE 4, 1982

Prepared for
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C. 20590

Reproduced By
U.T.U. PRINTSHOP

PREVENTING ALCOHOL AND DRUG-RELATED ACCIDENTS ON RAILROADS

- 1.0 INTRODUCTION
- 2.0 1982 TELEPHONE SURVEY: THE PROBLEM AS SEEN FROM THE FIELD
 - 2.1 Alcohol and Drug-related Accidents
 - 2.1.1 Rule G Violations in 1981
 - 2.1.2 Drug Abuse and Rail Safety
 - 2.2 FRA and NTSB Records
 - 2.3 Project REAP: Alcohol-related Accidents
 - 2.4 Problem Drinkers and Non-Problem Drinkers as Safety Risks
 - 2.5 Issues
- 3.0 1982 TELEPHONE SURVEY: STRATEGIES FOR PREVENTING ALCOHOL AND DRUG-RELATED ACCIDENTS
 - 3.1 Employee Assistance Programs
 - 3.2 EAP Contribution to Rail Safety
 - 3.3 Programs That Do Not Have "Help-Without-Penalty" Provisions
 - 3.4 Programs That Do Have "Help-Without-Penalty" Provisions
 - 3.4.1 Optional Waiver of Rule G Investigation
 - 3.4.2 Rule G By-Pass
 - 3.5 Other Company Practices
 - 3.5.1 Rule G
 - 3.5.2 The Intoxilizer
 - 3.5.3 Other Drug Detection Equipment
 - 3.6 Issues
- 4.0 RECOMMENDED STRATEGIES FOR PREVENTING ALCOHOL AND DRUG-RELATED ACCIDENTS
 - 4.1 Getting Better Data on The Problem

- 4.1.1 Information on Accidents Caused by Worker Use of Drugs and/or Alcohol
 - 4.1.2 Information on Rule G Violations
 - 4.1.3 Information on EAP Efforts
 - 4.1.4 Information on Work-Related Drug Use
 - 4.2 Preventing Workers With Alcohol or Drug Problems from Causing Accidents
 - 4.2.1 Demonstration "Help-Without Penalty" Programs
 - 4.2.2 Model Supervisory Training Program
 - 4.2.3 Peer Intervention Training Program
 - 4.2.4 Counselor Training Program
 - 4.2.5 Model Program for Drug Abuse Counseling
 - 4.2.6 Dissemination of White Paper to all Railroads and REAP Results to Non-Study Railroads
- This White Paper was written pursuant to Contract No. DTFR53-82-P-00278 issued by the Federal Railroad Administration. Points of view, findings and recommendations in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Transportation.
- Footnotes can be found at the end of the White Paper.
- 4.3 Preventing Non-Problem Drinkers/Drug Users from Causing Accidents
 - 4.3.1 Model Prevention Education Package for Entire Workforce Aimed at Reducing Alcohol and Drug-Related Accidents
 - 4.3.2 Experimental Changes in the Work Environment
 - 4.3.3 Prevention Education Workshops for Combined Safety and EAP Staffs
 - 4.3.4 Model Education Package for Rule G Violators Who Are Not Problem Drinkers/Drug Users
 - 5.0 Appendices

1.0 INTRODUCTION

Three years have passed since Project REAP completed its examination of the impact that worker drinking has on railroad operations. Among its findings, the study reported that in 1978:

- Many Rule G violations occurred and were observed.
- Most observed Rule G violations went unreported.
- Many employees hid or covered for intoxicated fellow workers.
- Many employees claimed to have seen all kinds of alcohol-related accidents.

In May, 1982 the Federal Railroad Administration (FRA) sponsored an independent telephone survey to find out what railroad companies now think about the safety implications of worker drinking and drug use, what actions railroad companies are now taking to prevent alcohol and drug-related accidents and what ideas company representatives have on better ways to reduce the number of these kinds of accidents. This paper reports on the way railroads view and handle the problem today. It concludes with some recommendations on improving the effort.

2.0 1982 TELEPHONE SURVEY: THE PROBLEM AS SEEN FROM THE FIELD

In the last two weeks of May, 1982, former Project REAP staff conducted a telephone survey of twenty-one directors of employee assistance programs serving the workers on twenty-four Class I railroads.¹ These railroads employ 417,000 workers. We also spoke to eight safety directors on railroads employing 241,000 workers about safety programs specifically aimed at preventing accidents related to

substance abuse. Directors were asked for the following information about alcohol drugs and safety

- statistics on alcohol-related and drug-related accidents.
- statistics on Rule G violations.
- company handling of Rule G violations.
- statistics on the numbers of clients served by EAP's and the kinds of problems these clients have.
- ideas about FRA's future role in this area.²

Section 2.0 summarizes the directors' responses to questions about available company data on the problem and raises the issues concerned with improving our information about the problem in the future.

2.1 Alcohol and Drug-Related Accidents

All twenty-one directors said that company officials considered on-the-job drinking a serious threat to safety. All but one of the directors said that these officers also considered on-the-job drug use a serious safety concern.

We asked each railroad for statistics on alcohol and drug-related accidents for 1981. All but one of the roads said that they did not have any statistics on such accidents. The exceptional road indicated that drug use was suspected but not proven in two cases and that as far as the company could tell, alcohol was not involved in any accident that occurred in 1981.

2.1.1 Rule G Violations in 1981

In an attempt to get some notion of the *potential* safety threat posed by worker drinking and drug taking, Project REAP staff asked program directors about the number and disposition of Rule G violations in 1981. Only five of

the directors knew the number of Rule G violations for which formal charges were filed. None knew the final disposition of these cases. The rest of the directors said either that their offices do not compile these records or that these records were not compiled across the system. Three volunteered that Rule G cases were the exclusive domain of management and not a responsibility of the employee assistance program.

The five roads which provided statistics on Rule G violations employ 93,500 workers. Table 1 presents estimates of work-related drinking behavior on these railroads in 1981.³

TABLE 1
JOB-RELATED DRINKING BEHAVIOR OF WORKERS
ON FIVE CLASS I RAILROADS BASED ON
TELEPHONE SURVEY

Behavior	Number of Employees
Drinking on duty	11,000
Drinking subject to call	12,000
Total violations	70,000
Little drunk on-duty	14,000
Very drunk on-duty	4,700

When we project the rates for Rule G violations from Project REAP to these railroads as we do in the table above, we estimate the number of Rule G violations there to have been 34,000 on-duty violations, 36,000 violations subject to call for a total of 70,000 Rule G violations. More than 14,000 workers were on the job "a little drunk" and about 4,700 were "very drunk" on duty.

The directors from these five Class I railroads reported that there were seventy-nine Rule G investigations on their railroads in 1981. If we assume that supervisors or fellow workers observed at least the 4,700 workers who were "very drunk" at work, then at most, *less than 2 percent of observed blatant Rule G violations was reported in 1981 on these roads.*

2.1.2 Drug-Abuse and Rail Safety Today

Information about drug abuse on the railroads is as paltry as information was on alcohol abuse before Project REAP. There are signs that work-related drug use is a growing problem. EAP directors point to the entrance of young workers who grew up during the "drug revolution" when drugs first became widely available and used in this country. Only five EAP directors were able to provide figures on the number of their clients who had drug problems. On these roads, 15 percent of clients had problems with drugs only or with alcohol and other drugs combined.

Many directors say that they are seeing more and more people using alcohol in combination with other drugs (e.g. marijuana and valium) and other drugs alone and in combination. They also report an increasing concern about the use of drugs, especially marijuana, on the job. A few said that most EAP's on the railroads were not properly staffed to deal with workers who had problems with drugs other than alcohol.

Several mentioned special concern over a growing use of cocaine because cocaine users often have to sell part of their supply to be able to afford their own recreational use. All agreed that hard data about the nature and size of the drug problem are simply not available.

2.2 FRA and NTSB Records

Project REAP staff looked at FRA's accident records for 1981 and for the six preceeding [sic] years. The information in these records come from railroad companies. FRA Cost Code 510 records accidents caused by "impairment of efficiency and judgment due to drugs and alcohol." Table 2 summarizes the data on alcohol and drug-related accidents under Cost Code 510.

Table 2
TOTAL ACCIDENTS AND FATALITIES
AND ALCOHOL-DRUG RELATED ACCIDENTS
AND FATALITIES FROM 1975-1981

Year	Total Accidents	Alcohol-Drug Related Accidents	Total Fatalities	Alcohol-Drug Related Fatalities
1975	8,041	1	82	0
1976	10,248	2	152	0
1977	10,362	0	108	0
1978	11,277	1	139	2
1979	9,740	4	100	1
1980	8,451	2	97	0
1981	5,781	1	63	0
Total	63,900	11	741	3

According to these records, between 1975 and 1981, there were 63,900 reportable accidents involving 741 deaths. Eleven of the reported accidents and three of the reported deaths were attributable to alcohol or drugs. Only one of 5,781 accidents reported in 1981 was attributed to the use of alcohol or drugs. Both management and labor have compelling reasons for not wanting to investigate and report on accidents connected with alcohol and drugs.

Railroad companies to [sic] not want to be sued for damage of property not owned by the railroad or for injuries to members of the public at large. Unions are worried about losing worker injury claims because of the negligence of a Rule G violator.

Both management and labor fear public reactions to disclosures of alcohol and drug-related accidents.

The FRA does not get better information on alcohol related accidents because it does not receive it from company safety offices. Company safety officers say they do not receive it from operating divisions which investigate accidents. Operating officers either do not have it because they do not investigate closely or investigate closely and find nothing or find something but will not divulge it. The result is that if one were to make judgments about the connection of accidents, alcohol and safety on the basis of official documents alone, one would have to conclude the problem hardly exists.

The National Transportation Safety Board (NTSB) investigated six of the seven accidents which FRA showed as alcohol or drug-related from 1975-1981.⁴ In several accident reports and before Congress, NTSB recommended that the FRA promulgate requirements that all U.S. railroads establish specific no drinking periods for train crewman on duty and before duty similar to those required by the Federal Aviation Administration for airline pilots (8 hours) and that the FRA see to it that these rules are enforced.

We asked eight safety officers for their opinion of FRA figures. They all indicated that they thought the numbers grossly underestimated the reality just as their own records did. Operating personnel, they thought, seldom reported the true cause of alcohol and drug-related accidents to

their offices. They in turn seldom have information linking accidents to alcohol and drugs to submit to FRA. One safety director, however said that he thought his railroad had five alcohol-related deaths between 1975-1981 — more than FRA records show for the entire industry for that period.

NTSB usually studies accidents only when someone is killed, tremendous damage occurs or a potential calamity is narrowly averted. By their very nature, such investigations may reveal just the tip of an iceberg. The NTSB's repeated call for additional Federal regulations indicates a belief on the part of the Board that the safety risks caused by worker drinking and drug use are serious and widespread.

2.3 Project REAP: Alcohol-Related Injuries and Accidents

Safety officers on the seven study railroads reported 29,845 on-the-job injuries during 1978. According to the responses of workers in the general survey, an estimated 1,200 workers on all roads caused injury to themselves or to a fellow-worker because of their drinking. None of these alcohol-related injuries occurred among exempt workers. *About one out of every twenty reported injuries, then was alcohol-related.*

Although Project REAP did not produce empirical evidence on the direct connection between accidents and drinking prior to the accident, it did show that there is good reason to believe that drinking could be a serious contributing factor.

The studied railroads had a total of 4,239 reportable accidents (that is, accidents involving more than \$2,300 in damage) in 1978, for a total cost for damage of about \$65 million. We do not know what percentage of these ac-

cidents were alcohol-related. However, we do know that *large numbers of employees reported seeing damage of one kind or another related to drinking.* Table 3 shows the estimated number of workers on all railroads who saw various kinds of property damaged at least partly because of worker drinking.

Table 3
NUMBERS OF EMPLOYEES SEEING VARIOUS
KINDS OF ALCOHOL-RELATED DAMAGE

Kind of Alcohol-Related Damage Seen	Approximate Number Seeing Damage
Trains	7,000
Tracks	5,000
Construction	4,000
Buildings	7,000
Trucks, Buses, Autos	13,000
Office or Factory Equipment	8,000

On one railroad, alcohol-related accidents were seen one time by 33 percent of employees; on another, by 25 percent; and on one the railroad with the fewest witnessed events, by 5 percent of employees. Supervisors concurred that workers who drink on the job run a higher risk of injury than others. A majority of railroad workers fear for their safety when working with co-workers who are drinking.

2.4 Problem-Drinkers and Non-Problems Drinkers As Safety Risks

During our telephone survey, one program director indicated that 55 percent of the Rule G violations reported on his road in 1981 were committed by non-problem

drinkers.⁵ He said he believed that an even higher percentage of Rule G violations were committed by non-problem drinkers. This opinion coincides with Project REAP data on rule violations. Many other directors call a worker who violates Rule G a problem drinker *ipso facto* or simply do not believe problem drinkers as defined here violate Rule G all that much.

One out of every 5 workers or 1 out of every 4 workers who drank was a problem drinker. An estimated 44,000 workers on the seven REAP study roads were problem drinkers. Four out of every five workers or about 190,000 were non-problem drinkers. These non-problem drinkers included 1 out of every 4 workers who did not drink at all (57,000 workers) and 1 out of every four workers who drank but had no regular problems. Table 4 shows the number of rule violations accounted for by problem drinkers and non-problem drinkers in the REAP study.

Table 4

**RULE G VIOLATIONS COMMITTED BY PROBLEM
DRINKERS AND NON-PROBLEM DRINKERS**

Type of Drinkers	Number of Workers	Number of Violations
All Drinkers	175,000	174,000
Problem Drinkers	44,000	58,000
Non-Problem Drinkers	130,000	116,000
(Abstainers)	(60,000)	—

One out of every four workers who drinks was a problem drinker, but *one out of every three rule violations was committed by a problem drinker*. Three out of every 4 workers who drink was a non-problem drinker and *two*

out of every three Rule G violations was committed by a non-problem drinker. This important observation is depicted in Figure 1.

- Reported Rule G violations continue to be a small fraction of estimated actual violations, and many railroads fail to compile records on these few Rule G investigations and their disposition across the system.
- Company representatives consider worker drug use to be a growing serious safety problem.
- Data on drug abuse and safety-related drug problems among railroad workers do not exist. There is no identifiable effort to develop credible data on drug abuse among railroad workers. Many programs do not even routinely compile statistics on the number of their clients who have different kinds of problems.
- Non-problem drinking workers as well as problem drinkers are involved in work-related drinking that threatens safety.

3.0 1982 TELEPHONE SURVEY: STRATEGIES FOR PREVENTING ALCOHOL AND DRUG-RELATED ACCIDENTS

In addition to asking program directors and safety directors about company views on alcohol, drugs and safety, we asked them what railroads are now doing about the problem. Project REAP recommended a "Help-Without Penalty" policy to reach more problem drinkers who constitute a safety risk. The study also recommended the initiation of prevention strategies aimed at non-problem drinkers who are safety risk.⁵ In this section, we describe the efforts companies are now making to reduce alcohol and drug-related accidents.

3.1 *Employee Assistance Programs*

Employee assistance programs represent the rail industry's principal effort explicitly funded for and directed toward alcohol and drug abuse. Of the 21 programs serving 24 Class I railroads throughout the country, eight serve an almost exclusively problem drinking clientele. Fourteen serve employees with drug and other personal problems keeping their work below acceptable levels. All of the programs are formally aimed at identifying and helping problem drinkers.⁶ Some also target problem drug users. With one possible exception, none has a component aimed at drinking rule violators who are not problem-drinkers even though non-problem drinkers may account for as much as 67 percent of Rule G violations.

As we have seen, problem drinkers made up about 20 percent of the REAP study roads. They are a serious safety risk since they accounted for 33 percent of Rule G violations. When we project the problem drinking rate of the seven REAP study roads to the Class I railroads surveyed by phone, we estimate 79,000 of the 417,000 employees on these roads are problem drinkers.

3.2 *EAP Contribution to Rail Safety*

The programs serving these Class I roads reported that they served 3,200 clients in 1981. Too few roads had statistics on the kinds of problems these clients had for us to say how many were for alcohol problems only. The definitions of rehabilitation used by programs varied among the roads.

But even if one allows that all the clients had alcohol problems and that all were permanently restored to adequate job performance, EAP's reached at the very most an average of 6 percent of problem drinkers in 1981.⁷ The

penetration rate ranged from about 2 percent to about 14 percent. In general, programs with higher counselor-to-problem-drinker ratios reached higher percentages of problem drinkers. The record of railroad EAP effectiveness is probably as good as or better than programs in many other industries. In addition, the very presence and activities of EAP's may have some undefinable effect on accident prevention through consciousness raising. Still it is hard to show that EAP's alone, especially as they are now structured and funded, can make a very sizable contribution to preventing alcohol-related accidents until they begin reaching more problem-drinkers who are undoubtedly involved in them. Project REAP suggested changes in programs that would increase company success in dealing with the work-related drinking of problem drinkers. The most important suggestion was for a "Help-Without-Penalty" provision.

3.3 *Programs Not Having "Help-Without-Penalty" Provisions*

A "Help-Without-Penalty Policy" gives a troubled employee a guarantee of job security and promotion potential if he accepts the help offered by the company. Help is made available without penalty even though the individual was not performing adequately at the time of identification. This policy derives directly from definitions of problem drinking as incipient alcoholism, drug abuse as potential drug addiction and alcoholism and drug abuse as health problems. Employees whose job performance does not improve or who fail to take advantage of the help offered to them may be subject to discipline culminating in dismissal.

The telephone survey revealed that 22 of the 24 Class I railroads contacted require a formal investigation even for a first Rule G violation whether employees accept help or

not. If the charges are proved, violators are dismissed on 20 railroads. One railroad suspends violators for ninety days after a first offense. Another railroad applies a cumulative demerit system. Violators are given 30 demerits for each Rule G violation. Violators are dismissed when they accumulate 100 demerits. Participation in the program is not coerced. Three railroads virtually guarantee that alcoholics and other addicted workers may return to work on an individual basis when they are fit. Some roads continue to require minimum periods out of service ranging from 3 months to 1 year before consideration will be given to reinstatement. Two railroads will consider taking back rehabilitated addicts after six months and other employees (presumably including unrehabilitated addicts) after one year. On these twenty-one railroads, the rule violator who is a non-problem drinker can be returned to work only by winning in the investigation (a rarity) or by reconsideration after a minimum period out of service.

All these twenty-two railroads have two basic things in common. They *all require a mandatory investigation* and they all allow workers to participate in the employee assistance program on a voluntary basis if they want to be considered for reinstatement.

It is not hard to understand why supervisors hesitate to report rule violators under these conditions. They fear the ever present threat of dismissal with no guarantees of reinstatement even after what is sometimes a long fixed period out of duty. Even on the three roads where reinstatement is virtually assured to successful program participants, job restoration is not at all assured to violators who do not need the program. A reported Rule G violator who is not sick by the program's definition will be dismissed. And so, rather than put a fellow worker under

the risk of losing his job, the vast majority of supervisors usually ignore the violations and occasionally try to get the violator to go to the program on his own.

3.4 Programs That Do Have "Help-Without-Penalty" Provisions

Two railroads have made a significant change in this "Mandatory Investigation—Voluntary Referral" approach. Under this prevailing procedure, employees have to undergo an investigation even if they accept and cooperate with help. Railroads using this practice have a "Ship-out-and-shape-up policy." In contrast, two railroads practice different versions of a "Shape-up or ship-out policy." The approach on these two roads is "Mandatory Referral—Contingent Investigation."

3.4.1 Optional Waiver of Rule G Investigation

On one of these railroads, charges are immediately filed when a Rule G violation is reported. However, a worker may waive the investigation by entering and cooperating with the program. The program evaluates the worker's condition and determines whether he needs specialized assistance or not.

Troubled employees are referred to appropriate sources of help and are restored to work after the program counselor certifies their fitness.⁸ Workers without problems requiring special assistance are returned to service after a first offense. During the REAP study, this railroad had the highest percentage of reported and charged drinking rule violators. The EAP on this railroad reached 14 percent of its target clientele in the study year. Finally, over the past seven years, only one worker failed to go to the program and went through the grievance procedure. He was dismissed.

3.4.2 Rule G By-Pass

A second railroad has an experimental program on one division of its system. This version of the "Shape-up or ship-out" policy is called the Rule G Bypass. A local union lodge initiated the idea in October, 1980. This new procedure requires a change in the working agreement between labor and management, which permits management to conditionally hold Rule G charges in abeyance for more than 5 days after a violation is reported. When a worker observes a fellow employee or subordinate in an "unsafe condition," he tries to summon an officer and a witness to the scene. The suspected Rule G violator is asked if he is ill or hurt. If he is not and demonstrates clear signs or drinking or intoxication, he is taken off the job and off of company property. He is paid for the rest of the day. The company does not immediately file charges. Instead, the company holds the charges in abeyance and by-passes Rule G temporarily. The rule violator then has five days to go to the program for an evaluation. If he is found to have a problem and cooperates successfully with the program, he is returned to work on the program's recommendation. If he is not a troubled employee, he is sent back to work as long as he is not considered a safety risk. On a second offense, charges are immediately filed and violators must go through an investigation.

When a Rule G violator refuses to go to the program within five days of his first infraction, he is put on administrative leave for forty-five days. During this last grace period, he may still go to the program. Peers and family members have an opportunity to try to persuade him to go. The threat of charges and an investigation remain over his head. If he fails to get to the program by the end of the forty-fifth day, charges are filed, an investigation is held and the worker is dismissed if the charges are proved.

At this writing, data are not available on the effectiveness of this by-pass arrangement. The program director on this road promises to share evaluation results at the 1981 conference on employee assistance programs in New Orleans. However, he did indicate during the telephone survey that the road had a drop in grievance procedures and in accidents on the division where the by-pass agreement is being tried. The company attributes this reduction in grievances and accidents to the by-pass policy. So far the Rule G by-pass arrangement has not been extended to other segments of the road.

3.5 Other Company Practices

Railroad EAP's promote rail safety by identifying and rehabilitating problem drinkers and problem drug users. EAP's were never formally structured to achieve other accident prevention objectives as an explicit part of their mandate (reduce use of intoxicants before and at work, keep intoxicated workers from reporting or going on to work when intoxicated, prevent Rule G recidivism among non-problem drinkers and drug users, promote responsible decisions about the use of intoxicants). However, over the past five years, railroads have pointed to EAP's to demonstrate the effectiveness of voluntary company programs in dealing with the safety problems caused by employee drinking and to ward off the imposition of Federal regulations.

In our telephone survey, we asked directors what kinds of programs or policies their railroads had in place besides EAP's to prevent alcohol and drug related accidents. We asked eight safety directors the same question about their roads. Almost all of them mentioned Rule G. Some mentioned brief presentations by directors or EAP staff at regular safety meetings. Only one director was satisfied that Rule G and safety briefings alone were enough to do

something significant about the problem. One railroad indicated that the EAP program works formally and very closely with its safety department in its efforts to educate the entire workforce about the connection of alcohol, drugs, and safety. One railroad tried to use an intoxilizer but had to discontinue its use because of litigation. Company officials think the intoxilizer still has potential as a preventive technique. At least one other railroad is examining the feasibility of using other drug detection equipment. One director argued strongly that his EAP was making a significant contribution to rail safety. Penetration rates from that road indicate that like the rest of railroad EAP's, this program cannot do enough alone to keep work-related alcohol and drug abuse under adequate control.

3.5.1 Rule G

Most directors thought that Rule G has some deterrent effect. Project REAP corroborates this view. From REAP, we know that 90 percent of workers say that Rule G keeps them from work-related drinking at least some of the time. We also know that the current application of Rule G does little to deter 12 percent of workers who do violate the rule from continuing to break it and that investigations touch only a small fraction of workers who are seriously intoxicated at work. They reach an even smaller percentage of other Rule G violators.

None of the program directors advocated doing away with Rule G. In fact, no one within or outside the industry has ever made a public case for removing the rule. Project REAP recommended that companies "maintain existing drinking rules and consistently apply these rules to all workers including exempt employees." In and of itself, Rule G is a sensible organizational standard.

3.5.2 The Intoxilizer

One railroad, convinced that the magnitude of the problem required more than just Rule G and the EAP, introduced a new preventive strategy into the workplace—the intoxilizer. The intoxilizer is the only major innovation directly aimed at preventing alcohol related accidents which the telephone survey was able to identify.

In January, 1980 the Southern Pacific Transportation Company issued a bulletin to all employees announcing a new alcohol-related, safety demonstration program under the administration of the S.P.'s Safety Department. During a trial period between June, 1980 and September 1980, employees were randomly required to undergo a breath test using an intoxilizer to detect the presence and measure the amount of alcohol in their blood. The company sent home employees with positive readings though it did not assess discipline during the demonstration period. During this same time, the company did not say what it would do to employees with alcohol in their blood after the demonstration period. Labor did not have a chance to participate in the program's design or implementation.

The International Association of Machinists and Aerospace Workers sought an injunction against the use of the intoxilizer in U.S. District Court for the Northern District of California. On July 11, 1980, District Judge Williams denied injunctive relief on the grounds that the Railway Labor Act afforded the proper remedy.

On September 16, 1980, the Vice President of Labor Relations informed the General Chairman of Operating Organizations that the demonstration period was ended and that the intoxilizer program was to immediately become an established practice. All S.P. employees were subject to intoxilizer testing while going on duty or while on duty. A person *going on duty* who refused to take the

test or who registered less than 0.10 blood alcohol concentration (less than five unoxidized drinks in one's system) was not to be allowed on the job. A worker going on duty who registered 0.10 BAC (5 or more unoxidized drinks) or more was to be taken out of service and charged with a violation of Rule G. A positive reading *on duty* at any level (e.g., 0.01 or one-half a bottle of unoxidized beer) was to result in removal from service and Rule G charges.

On September 27, the Brotherhood of Locomotive Engineers went on strike over this new policy. The strike ended September 28, 1980 in compliance with a preliminary injunction issued by the Federal Court, Northern District of California. The issue remains before the National Railroad Adjustment Board.

The unions involved have criticized the S.P.'s intoxilizer program on several counts. They contend that the SP did not involve them in conceptualizing and implementing the program. They questioned one triggering level of blood alcohol concentration (0.01 BAC) as sufficient grounds for keeping workers off the job and for filing Rule G charges against workers on-duty. They questioned the intoxilizer's sensitivity to accurately detect such low readings and the validity of interpreting them as necessarily caused by alcohol. They strongly rejected the use of the intoxilizer as a punitive rather than corrective tool. And finally, some union representatives argued that there was little point in making a high priority out of detecting more Rule G violators when little was being done about already detected violators.

Under different conditions, for different purposes, with labor cooperation, and as a corroborative [sic] instrument, the intoxilizer might have found a place as a tool to help prevent alcohol-related accidents in the railroad industry. The unfortunate experience on the S.P. makes its intro-

duction anywhere on an experimental, controlled and therapeutic basis unlikely at least in the near future.

3.5.3 Other Drug Detection Equipment

One of the surveyed railroads said that the company was looking into drug testing equipment besides the intoxilizer. The intoxilizer measures only alcohol levels. Until recently, most drug detection tests were of the kind that could be done in a laboratory (e.g. blood and urine tests). New kinds of testing (especially urine tests for marijuana) are now becoming available and are being introduced in some industrial settings. There are basically three uses to which this drug detection equipment can be put: screening of applicants, testing of employees suspected of drug use and testing of employees on a random basis.

Controversial issues about these new drug tests are more numerous than those surrounding the use of the intoxilizer. Our new highly heralded urine test detects the presence of various drugs. However, it does not sufficiently pinpoint the time of consumption to be of much use to an industry like railroads. For example, it can tell whether a person has marijuana in his system but can only say that the drug entered the body from between one hour and two weeks prior to testing. The ability of the equipment to determine the time when workers took different drugs varies from drug to drug.

There are other objections being raised about the rapid introduction of drug detection equipment in the workplace. Civil libertarians argued that the use of such equipment is an intrusion into the private lives of workers. They argue that workers should be able to do as they please on their own time as long as their behavior does not affect job performance. Many workers contend that the use of the equipment especially on a random basis and without probable cause is a demeaning practice as well as an invasion of

a worker's civil rights. Some researchers claim that the use of drug detection equipment by briefly trained personnel yields questionable results. All these arguments become more vehement when the end result of a positive reading is punitive rather than therapeutic.

Whatever future utility drug detection equipment may have, this new intense interest in detection technology could divert railroads away from another critical point in employee assistance programming. Referrals to programs ought to be based on signs of unexplainable *deteriorating job performance* not on the basis of diagnostic evidence that a worker is an alcoholic or drug addict. Supervisors should be taught to define, monitor and evaluate work and to document inadequate performance as basis for referral. Doing what a supervisor is supposed to do in the first place will probably have better results than the maladroit introduction of detection equipment in the workplace at the present time.

3.6 Issues

The following issues emerge from an examination of ongoing company efforts related to worker substance abuse and safety as they were described by EAP directors:

- With few exemptions, railroads have done little if anything new since Project REAP to successfully reduce the dangers to safety posed by the work-related drinking, intoxication and drug abuse of employees. No new effective strategies are in place to prevent the work-related substance abuse of habitual Rule G violators.
- Despite the unarguably good job EAP's do with their limited staff and resources, most programs do not make a large contribution to controlling the work-related drinking of problems drinkers who

are safety risks. At the very most, EAP's reached an average of about 6 percent of problem drinkers in 1981. Most EAP's were never structured and funded to do much more than that. Company efforts to reduce the potential for alcohol-related accidents among problem drinkers are not equal to the task.

- Although Rule G deters most workers from work-related drinking some of the time, company efforts to reduce the potential for alcohol-related accidents among rule violators who are not problem-drinkers are virtually non-existent.
- Most railroads have still not introduced a "Help-Without-Penalty" provision into their programs even though most managers and workers favor it and the policy is a key, if not defining, characteristic of programs outside the railroad industry.
- Most railroads continue to maintain a traditionally punitive rather than corrective posture toward Rule G violations. So far this punitive focus has not changed in discussions about the introduction of modern detection equipment into rail systems.
- Even though the use of drug detection equipment raises questions about privacy, civil rights, accuracy and final disposition, railroad management may introduce such equipment unilaterally before satisfactorily resolving worker concerns.
- Almost nothing is being done to reduce the potential for accidents among drug abusing employees.

4.0 RECOMMENDED STRATEGIES FOR PREVENTING ALCOHOL AND DRUG-RELATED ACCIDENTS

In order to prevent, or, at least reduce the number of alcohol and drug-related accidents, railroad companies will have to plan strategies to reach the following prevention objectives:

1. identify and rehabilitate workers who are problem drinkers *and* drug abusers.
2. keep workers from using intoxicants *before* work.
3. keep workers from using intoxicants *during* work.
4. keep intoxicated workers from coming to work.
5. keep workers who report intoxicated from going on the job.
6. keep disciplined Rule G violators who are not problem drinkers or problem drug users from breaking the rule in the future.
7. foster sensible decision-making about alcohol and drug use among employees.

FRA should make assisting railroads to achieve these accident prevention objectives a high priority item. The FRA should assign a full-time professional to plan, coordinate and advise on FRA's alcohol and drug-related safety efforts. In addition to this, there are three sets of recommendations that need to be considered. One set of recommendations is aimed at improving the information which we have on alcohol and drug-related accidents and on work-related alcohol and drug-use (Section 4.1). A second set is aimed at improving and expanding EAP efforts to prevent problem drinkers and drug abusers from causing accidents (Section 4.2). A third set suggests ways of preventing the rest of the workforce from causing such accidents (Section 4.3).

4.1 *Getting Better Data on the Problem*

As we have seen, "the information currently available to the FRA about the impact of worker drinking/drug use on rail safety is too suspect to serve as a basis for policy formulation" in this sensitive area. We recommended the implementation of the following actions to ensure the acquisition of the information the FRA needs to carry out its safety mandate.

4.1.1 *Information on Accidents Caused by Worker Use of Drugs and/or Alcohol*

- Initiate and implement an on-going policy that will overcome company and union disincentives to accurately and fully reporting the causes of alcohol and drug-related accidents. Voluntary disclosure has not worked in the past. Previous recommendations to improve investigations, documentation and reporting have not been implemented.
- Among available options, give strong consideration to an audit-penalty program. Audit a minimum percentage of company accident investigations both in suspicious circumstances [sic] and on a random basis. Penalize railroads that do not adequately investigate and report the actual involvement of alcohol and drugs with fines severe enough to compel full disclosure in the future.

4.1.2 *Information on Rule G Violations*

Rule G investigations are one of the tools railroads use to deter undesirable work-related drinking and drug use and prevent accidents. We need more comprehensive data in this area to tell how much of the problem is being addressed through this tool.

- Develop a standard one page data collection instrument on Rule G charges and case disposition.
- Ask railroad labor relations officers to compile this data in standard formats on an on-going basis.
- As a service to the field, collect, analyze and publish these data once a year in a way that protects the anonymity of individual railroads.

4.1.3 *Information on EAP Efforts*

Railroad EAP's are a second tool companies have to reach workers whose alcohol and drug use threaten safety. Industry-wide data on EAP effectiveness is also needed.

- Develop a one page standard instrument to record how many of what kinds of clients EAP's serve with what effect.
- Ask railroad EAP directors to regularly compile this data.
- Collect, analyze and publish these data on an annual basis and share them with the field. Again protect company anonymity.

4.1.4 *Information on Work-related Drug Use*

The railroad industry has the best data of any American industry on its alcohol problems. It has virtually none on the work-related use of other drugs.

- Examine the feasibility of conducting a study of the extent, impact and handling of work-related drug use on railroads.
- Incorporate unanswered safety-related questions on alcohol in this study.
- Develop and publish a paper on the issues involved in the industrial use of drug detection equipment.

4.2 *Preventing Workers with Alcohol or Drug Problems from Causing Accidents*

In Section 3.6, we concluded that "company efforts to reduce the potential for alcohol-related accidents among problem drinkers are not equal to the task." They need to be improved and expanded. Section 4.2 offers suggestions on how these efforts might be enhanced and broadened.

4.2.1 *Demonstration "Help-Without-Penalty" Program*

- Co-design a "Help-Without-Penalty" Program with (a) participating railroad(s).
- Co-design an evaluation of the program and test it over time.
- Analyze and publish results.

4.2.2 *Model Supervisory Training Package*

- Co-develop a supervisory training package with selected EAP directors or staff.
- Test the package on at least one road.
- Share the package with all railroad EAP's.

4.2.3 *Peer Intervention Training Program*

- Up-date the existing training program together with labor representatives.
- Promote or co-sponsor delivery of the program to local chairmen together with EAP's and union representatives.

4.2.4 *Counselor Training Program, Staff Levels and Qualifications*

- Promote or co-sponsor an annual needs assessment of counselor training needs.
- Promote or co-sponsor two programs annually on selected identified in the needs assessment.

- Promote counselor staffing levels at one counselor per every 3,000 workers.
- Promote state certification for all railroad counselors.

4.2.5 *Model Program in Drug Abuse Counseling*

- Tailor existing training materials on drug abuse counseling to meet counselor needs on railroads.
- Promote or sponsor training in drug abuse counseling.

4.2.6 *Dissemination of White Paper to All Railroads and REAP Results to Non-Study Railroads*

- Mail this White Paper to key personnel on all railroads.
- Offer briefings to non-study railroads on the much ignored or overlooked findings and recommendations of Project REAP.

4.3 *Preventing Non-Problem Drinkers/Drug Users from Causing Accidents*

Each of the strategies described below presumes the acceptance of a broadened perspective on the part of railroads. Put simply, railroad companies need to move beyond programming that identifies and treats alcoholics to strategies that reduce alcohol *and* drug-related accidents.

Alcoholic workers are certainly a safety risk—a serious one. Rehabilitating them is a necessary part of any prevention strategy. But even if all railroad personnel who are alcoholic were rehabilitated overnight, serious safety risks related to substance abuse would remain.

4.3.1 *Model Prevention Education Packages for Entire Workforce Aimed at Reducing Alcohol and Drug Related Accidents*

- Develop a simple prevention education package for all workers.
- Test the package one road. Refine it in light of the test.
- Share the package with EAP's.

4.3.2 *Experimental changes in the workplace environment*

- Work with (a) railroad(s) to identify workable changes in work environment that might reduce the potential for alcohol and drug related accidents.
- Install the changes on participating roads.
- Evaluate, document and disseminate results.

4.3.3 *Prevention Education Workshops for Combined Safety and EAP Staff*

- Promote joint workshops on individual railroads to develop program and policy ideas for reducing the involvement of alcohol and drug in accidents.
- Collect and share prevention strategies that emerge from these workshops with other railroads.
- Encourage on-going collaboration of EAP's and safety offices and closer relations between EAP's and operational divisions.

4.3.4 *Model Education Package for Rule G Violators Who Are Not Problem Drinkers/Drug Abusers*

- Develop this education package.
- Test the package with a participating railroad EAP that has a "Help-Without-Penalty" policy.
- Share the refined package with the field.

4.4 *Prevention Staff for EAP's*

- Promote the creation of staff positions for prevention specialists within EAP's.
- Promote the coordination of EAP prevention efforts with safety offices and operational divisions.

5.0 APPENDICES

APPENDIX A

Railroads in 1982 Telephone Survey

The Atchison, Topeka and Santa Fe Railway Company
 Bangor and Aroostook
 Bessemer and Lake Erie Railroad
 Boston and Maine
 Burlington Northern
 Chessie System
 Chicago, Milwaukee and St. Paul & Pacific
 Chicago and North Western Transportation Company
 Consolidated Rail Corporation (Conrail)
 Denver and Rio Grande Western Railroad
 Duluth, Missabe and Iron Range Railway Company
 Elgin, Joliet and Eastern Railway Company
 Family Lines
 Grand Trunk Western Railroad Company
 Illinois Central Gulf Railroad Company
 Long Island Railroad Company
 Maine Central
 Missouri Pacific Railroad Company
 National Railroad Passenger Corporation (Amtrak)
 Norfolk and Western Railway Company
 The Soo Line
 Southern Railway System*
 Southern Pacific Transportation Company
 Union Pacific
 Western Pacific

* We did not reach the appropriate representative on this railroad.
 None of the figures in this report represents statistics for the road.

APPENDIX B

Questionnaire Used in 1982 Telephone Survey

- A. What is your company's policy with regard to work-related alcohol-drug use? As a matter of practice, what happens to a Rule G violator who is *a problem drinker or alcoholic*? To a non-problem drinker?
- B.
 1. How many employees were disciplined for violating Rule G in 1981? What happened?
 2. How many employees were disciplined because of drug use in 1981? What happened?
 3. How many employee referrals were made to the EAP because of alcohol use that resulted in the delivery of direct services to employees in 1981?
 4. How many such referrals were made because of other drugs?
 5. Do you and your company consider on-the-job drinking a serious threat to safety?
- C. How many accidents took place on your road in 1981?
- D.
 1. How many of these accidents were alcohol-related?
 2. How many of these accidents were drug-related?
 3. Are employees required to be tested for alcohol-drug after they are involved in an accident?
- E. Is there any program/policy in place that is specifically aimed at reducing alcohol and drug related accidents? What is (are) if [sic] (they)?
- F. How effective do you think these approaches are in preventing alcohol and drug related accidents?

- G. What are the strengths and weaknesses of these approaches?
- H. Do you have an ideas about what companies can do to reduce alcohol-drug related accidents?
- I. What role do you think the FRA should play in fostering the reduction of such accidents on the railroads?

APPENDIX C

Alcohol and Drug-related Accidents Investigated Between 1975-1981 By the National Transportation Safety Board*

Date	Railroad	Location
July 28, 1977	Seaboard Coastline	Oglesby, Ga.
Dec. 31, 1978	Sante Fe RR	Carnero, N.M.
July 24, 1979	Southern Pacific	Thousand Ponds, Calif.
Aug. 12, 1979	Conrail	Alliance, Ohio
Nov. 23, 1979	Union Pacific	Long Beach, Calif.
Oct. 1, 1979	Conrail	Royersford, Pa.
Nov. 11, 1980	Sante Fe RR	Pisgah, Calif.

* Data was provided by the NTSB. At the time of this writing, the NTSB did not have the following information readily available: type of train accident, type of substance abuse involved, number of fatalities involved. This information is now being searched.

APPENDIX D

Help Without Penalty Policy

Railroad companies should adopt and implement explicit policies regarding the application of drinking rules. These policies should be disciplinary (that is, educative and restorative) rather than simply punitive in practice. They should be aimed at promoting increased reporting and control of rule violations and should include the following elements:

- a. Maintain existing drinking rules.
- b. Explicitly and consistently apply these rules to all workers, including exempt employees.
- c. Allow drinking-rule violators (first offenders) to retain an employment relationship as long as they enter and progress in treatment (problem drinkers) or enter and complete some educational regimen prescribed by the program (non-problem drinkers).
- d. After a first offense, keep problem-drinking rule violators out of service only until program counselors certify their fitness to return to service.
- e. Instead of dismissing non-problem-drinking rule violators on a first offense, suspend them for the average time needed by problem drinkers in treatment to return to service (use no more than three months until an average is established).
- f. Abandon all minimum terms for being out of service for drinking-rule violations.
- g. Dismiss all second offenders.*

* Minimum recommended requirement. For railroads willing to go farther, we suggest progressive disciplinary procedures culminating in dismissal after a third violation.

- h. Promulgate and explain this new relationship between the employee assistance program and company rules in the company policy statement and program materials.

Prevention Strategies**

Railroad companies should institute preventive practices aimed at reducing problem drinking and job-related drinking. These strategies ought to be aimed principally at changing the work-related drinking practices and environment of railroad workers.

** See pp. 172 to 173 of the final full REAP report for specific suggestions.

APPENDIX E

ESTIMATED EAP PROBLEM DRINKING PENETRATION
RATES FOR 1981* ON SURVEYED RAILROADS

Railroad	Penetration Rate
A	not available
B	1.7
C	5.6
D	2.6
E	8.3
F	5.6
G	9.3
H	14.2
I	not available
J	1.5
K	2.9
L	4.7
M	5.2
N	2.0
O	2.0
P	5.0
Q	5.2
R	6.8
S	7.0
T	8.8
U	3.5

*Alphabetical designations representing individual railroads are scrambled. Designations have no relationship to REAP designations.

$$\text{Penetration Rate} = \frac{\text{total client load}}{\text{total estimated number of problem drinkers}}$$

The total client load is the number of clients personally served in 1981. Though these clients include clients with problems other than alcohol, we count them all here as problem drinkers. The effect is to raise penetration rates.

Total estimated number of problem drinkers were estimated for roads not part of the REAP study by multiplying the current number of workers employed on each road by the average prevalence rate of problem drinking in the REAP study (19 percent). The figure was estimated for REAP study roads by multiplying the current number in the workforce by the prevalence rate for problem drinking on each road in the REAP study.

FOOTNOTES:

¹ See Appendix A for a list of these railroads.

² See Appendix B for the Questionnaire used in the telephone survey.

³ All the numbers in Table 1 are extrapolations. They assume that workers on these five railroads broke Rule G at about the same rate as workers on the seven REAP study roads in 1978.

⁴ See Appendix C for information on the alcohol/drug-related accidents investigated by NTSB.

⁵ See Appendix D for these two recommendations. See *Problem Drinking Among Railroad Workers*, pp. 37-55 for all of Project REAP's recommendations.

⁶ A problem drinker is a repetitive excessive drinker whose use of alcoholic beverages is regularly and directly linked to private or public harm and is seen as the source of difficulties in one or more important aspect of his life.

⁷ See Appendix E for a breakdown of these penetration rates.

⁸ A troubled employee is a worker whose job performance does not meet minimal acceptable requirements because of a personal problem (e.g. alcohol, drugs or emotional difficulties).

STATEMENT FOR THE RECORD

by

Richard A. Lindblad, Dr. P.H.
Associate Director for Policy Development
and Implementation

and

J. Michael Walsh, Ph.D.
Chief, Behavioral Pharmacology Branch
Division of Clinical Research

National Institute on Drug Abuse
Alcohol, Drug Abuse, and Mental Health Administration
Rockville, Maryland 20857

before the

Federal Railroad Administration Field Hearing on
Control of Alcohol and Drug Use in Railroad Operations

September 2, 1983

Mr. Chairman, the National Institute on Drug Abuse (NIDA) is pleased to have the opportunity to be here today to discuss with you the important issues of the effects of drugs in the workplace.

The impact of drug abuse and alcoholism on our Nation is devastating, both in terms of human suffering and in economic costs to our society. According to a recent study, the U.S. loses nearly \$66 billion a year due to problems associated with alcoholism and drug abuse. Most striking, lost productivity and unemployment account for more than half of this amount, or \$33 billion.

This year more than 100 million persons were employed in this country, of which between 5 and 10 percent suffer from serious drinking problems or alcoholism. Workers who have such alcohol problems are at least 25 percent less productive than their co-workers. It is somewhat more difficult to pinpoint the nature and extent of drug abuse among American workers because there is no uniform policy regarding drug detection, and studies generally have relied on self-report surveys which have definite limitations. Therefore, estimates of the impact of drug abuse in industry must be viewed with caution. Managers often are unaware of the signs and symptoms of drug abuse in people with whom they are working. Both alcohol and drug abusers can sometimes filter unidentified through the most careful and elaborate personnel procedures, and they often can be marginally productive on the job.

While we recognize the limitations of the available data, studies have conservatively estimated that 3 to 7 percent of the employed population are regular users of some form of illicit drug—ranging from marijuana to heroin. This percentage is in addition to the 5 to 10 percent of American workers who have alcohol problems, although there is some overlap in these populations.

In a NIDA-funded study of 200 companies and 5,000 workers, it was found that the prevalence of drug use averages 6 percent throughout the industrial sector. Marijuana appears to be the primary substance of use: 90 percent of the drug users indicated use of marijuana, and 37 percent of all current drug users reported use of marijuana exclusively. Use of amphetamines was cited by 34 percent and use of barbiturates was cited by 21 percent of the respondents, although nearly all respondents reporting use of these drugs also report use of marijuana.

Performance impairment resulting from alcohol and drug abuse can be wide ranging, affecting both the employee and the employer through:

- higher accident rates
- loss of productivity
- decreased quality of work products
- increased absenteeism
- increased average level of sickness benefits
- increased health insurance premiums
- increased workers compensation claims
- increased grievance submissions
- increased thefts on the job
- increased employee turnover
- increased interpersonal and morale problems

Recent technical advances in diagnostic techniques developed by NIDA's researchers have made available procedures suitable for the detection of drugs in body fluids. These tests are being broadly used by the Department of Defense in an effort to detect and reduce drug use and abuse in the Armed Forces. Publicity surrounding DoD efforts has generated significant interest by private industry with regard to the use of these new techniques. As a result, increasing numbers of private corporations and Federal programs are developing drug screening programs.

How best to use drug detection tests to screen employees for drug use is a complex question. Pursuit of public safety, efficient performance, and optimal productivity can be seen as conflicting with individual rights and civil liberties. We recognize the validity of the two basic sets of conflicting principles invoked: public rights and individual rights. However, we believe that there are certain situations where use of drugs by employees have such a potential for public harm or danger (e.g., on the highways, on the railroads, in the airlines, and other transportation industries) that it is entirely appropriate and indicated to make periodic checks to determine drug-impaired performance. In such situations of public safety, managers must lean toward a strict policy with regard to employee drug use.

DRUG DETECTION TECHNIQUES

As mentioned above, the development of technology which has evolved out of NIDA's research program has made available new tools for the detection of drug use. The purpose of these assays is to detect the presence of drug or drug metabolite in body fluids (e.g., breath, urine, blood, saliva). Presently, the most commonly used body fluid is urine since it is less invasive than blood, and assays are commercially available which can provide reliable, inexpensive urine screening for a variety of abused substances. We've noted that these techniques are being used by the Department of Defense worldwide and within the last year are beginning to become commonplace in corporate America as well. Industry, public utilities, law enforcement organizations, and the transportation industries (air, highway, rail) have contacted NIDA for technical assistance to discuss the formulation of drug policies within the last year.

Although urine screening technology is extremely effective in determining drug use, the positive results of the urine screen cannot be used to infer performance impairment since drug/drug metabolites may appear in urine for several days, even weeks (depending on the drug), without related impairment. Therefore, positive urine screens can only be used as presumptive evidence of use, not impairment. If company policies are tied to performance impairment, or use on the job, then blood would be the body fluid to assay; since it is generally scientifically accepted that presence of drug in blood indicates very recent use. Regardless of whether blood or urine is assayed, confirmation tests, preferably using different methods, should always be carried out prior to taking adverse actions against an employee.

Drug screening techniques are being used in a variety of ways; by law enforcement organizations to determine driving under the influence of drugs, by industry for pre-employment screening as well as the screening of existing employees, and in accident investigations. Results of these program efforts are just beginning to be evaluated, but it appears that drug detection techniques can be an extremely effective prevention tool. The DoD Worldwide Survey on Drug Abuse recently conducted in 1982 indicated that in the two years (1980-1982) since the implementation of drug screening techniques, the use of drugs by military personnel is down in every category. There is a continuum of options regarding how these techniques should be used and what actions should be taken once an individual has been identified as a drug abuser. Clearly company policies should be developed on a case-by-case basis and will depend to a great extent on the type of occupation and the risk involved for other employees and the public at large. Adverse actions can range from referral for treatment to

disciplinary action which may take the form of: (a) suspension, (b) loss of pay, (c) reduction in grade, (d) dismissal.

Management and unions need to work together to achieve consensus. Consultants are needed to set up and oversee laboratory procedures, for example: the type of assay to be used, quality control procedures, confirmation procedures, the sample chain of custody. Industry must set an educational process in place to inform employees of new policies. Procedures need to be explained. Contingency and adverse actions need to be set forth, both verbally and in writing.

The use of drug detection techniques is a complex area for American industry. It is not a panacea and most companies will require considerable technical assistance. Drug detection techniques can be a valuable tool in the war against drug abuse in the workplace, if properly approached and utilized.

The National Institute on Drug Abuse appreciates the opportunity to participate in these hearings on this important public health problem. We offer and pledge our technical and scientific capabilities in helping to design effective managerial procedures to reduce drug and alcohol abuse in the workplace.

EXHIBIT 7

AMERICAN TRAIN DISPATCHERS ASSOCIATION
AFL-CIO AND RLEA
8331 EAST HELEN STREET, TUCSON, AZ 85715

G. D. Bennett, Vice President
Telephone: 602/296-8676

March 1, 1985

Mr. R. E. Johnson, President
American Train Dispatchers Association
1401 South Harlem Avenue
Berwyn, Illinois 60402

Subject: Drug & Alcohol Abuse

Dear Bob:

This will refer to a recent incident on the SP at Los Angeles involving a Female Assistant Chief Dispatcher, and it's handling to date.

My knowledge of the incident, as relayed to me.

At 1:23 A.M. Sunday morning 2/24/85 a ATSF helper engine made a reverse move on double track, without direct permission of the Train Dispatcher on duty and nearly collided with an SP train.

The Train Dispatcher had *no radio communications* with the ATSF Engine. The train dispatcher attempted to relay some information (ONLY) to this engine through the operator at Kern Junction. The relay information was screwed up, etc.

The Female Assistant Chief called the Trainmaster at Bakersfield, she says, at 1:30 A.M. and asked who all she should call to notify. The Trainmaster said he would take care of it. The Superintendent was notified at 3:30 A.M.

The Chief Dispatcher, R. M. Gregory, played the tape for the Superintendent. The tape varified [sic] the fact that the dispatcher did not give the ATSF engine permission to make a reverse move.

The Superintendent ordered the trick and Assistant Chief to submit to a drug screen. Chief Dispatcher Gregory took both to a local clinic about 7:00 A.M. Sunday morning (somewhere on south main street LA slums). No problem with the trick man. The Female Assistant Chief was unable to g.ve a speciman [sic] account of the presence of a male attendant, who said the specimen had to be given in his presence. She tried drinking water and he ran water over her hands, etc. NO specimen, they finally let her go at about Noon. This incident totally upset the office for the simple reason there was NO PROBABLE CAUSE. I agree.

The Office Chairman, Forgues, called me. I informed him to contact the Superintendent, in a gentelmanly [sic] fashion and attempt to find out his reasoning. Forgues was to call me back. He talked with the Supt. who informed him he would be in Los Angeles the following morning to talk to him about it.

General Chairman, Hale, and Forgues finally discussed it with the Supt. about 1:00 P.M. Monday the 25th. Sherman, in the meantime, called General Manager Labers about the incident. The Superintendent's reasoning was that he felt someone was covering up something since he was not notified until 3:30 A.M. (still no reason to test the ACD).

After talking with you I called Sherman Hale and we talked about the incident a little more. The tape evidently reveals some of the mix up in communications with the operator at Kern Junction. I told Sherman to tell both Chief Dispatchers and both Superintendents, that NO TRAIN DISPATCHER WAS TO SUBMIT TO A DRUG

SCREEN WITHOUT FIRST CONTACTING EITHER YOU OR ME UNTIL SUCH TIME AS THIS THING IS STRAIGHTENED OUT WITH JACK SAGE.

Gregory made some remark and wanted in [sic] in writing. I told Sherman to tell him, NOTHING IN WRITING, we will let him know when we find out what is going on or what went wrong.

General Manager Bredenberg was in another Hotel in Houston at the same time I was in Houston. I contacted him and filled him in on this incident (it was not in his territory). He was upset at the incident, not us, and requested that he be called day or night if we ran into a situation that required calling either one of us.

I contacted Jack Sage, from Houston, on Thursday and gave him all the information I had on the incident. He was to check it out and get back to me on Friday.

Jack called about noon. First, he informed me that Doctor Meyer, Chief Surgeon, had handled with the head Doctor of the Clinic in LA, and that Doctor was very upset. Doctor Meyer is handling with the 187 Clinics the SP uses for test to see that this type of thing doesn't happen again. The SP has no written instructions out to it's Officers, just verbal. The reason being they didn't want to issue specific instructions until such time as the FRA rule is out. In handling this program all verbal instructions have been directed at Operating Crafts, nothing on the Non-Ops. Dave Fisher, Assistant to the General Managers, is handling the program and Jack wanted him to talk to me himself, and had him call me.

Dave called about 5:00 P.M. very apologetic about the incident, and that Dr. Meyer was handling with the Clinics, etc. Dave had listened to the tape and said there was a screw up in the information that was being relayed through the operator at Kern Junction (SP Communications). He indicated to me that the ACD had got into the

act by changing the instructions (herself), he did not indicate this was varified [sic] by the tape. There will be a joint investigation, and he said he was not sure they would even call the ACD as a witness.

My comments to him was that I felt it was poor communications and lack of training, which led to our communications complaint. General Manager Bredenberg has been assigned the task of heading up the committee involving our complaint on the communications.

As for drug screen test. The Superintendent is the only Officer on the local level that can order a test. Now, if he is in doubt he must call the General Manager. Drug screens will only be requested in case of HAZARD OF ACCIDENT-ABNORMAL BEHAVIOR or MAJOR RULES VIOLATION.

I told Dave I had no idea nor did I have control over what the Female Assistant Chief personally did with this thing. He recognized that.

Information from the other side of the coin. After the ACD had been subjected to this 5 hour ordeal, she called Forgues and filled him in what went on, she evidently contacted a lawyer later on, and on Monday, I am told, she went to a Doctor (Psychiatrist) and he admitted her to a Hospital.

At this point I am assured that this type of thing wont [sic] happen again, however, the drug screen test will continue under the categories above.

There have been four incidents since the program was initiated. One after a motor car was hit, (clean) one after some track machinery was almost hit-clock time etc. (not so clean), one when a MP train ran a red signal and derailed while the switch was in transition. (clean) and this incident.

By copy of this letter I will ask Sherman to tell the Chief's and the Superintendent's that we have assurance this type of incident won't happen again, and we are aware the test will continue but under a more supervised circumstance.

Also, Sherman, if either of these dispatchers are charged in this incident let me know.

Fraternally,

G. D. BENNETT
Vice President

cc: A. S. Hale
R. M. Forgues
Executive Board

PLAINTIFF'S EXHIBIT 6

AMA NEWS RELEASE

RECEIVED MAY 2, 1985

Cam. St. Leg. Dir.

EMBARGOED FOR RELEASE:

4:30 p.m. (CST), THURSDAY, APRIL 25, 1985

For further information, contact:

Martha Boyce

312/645-4843

FALSE LAB RESULTS COMPOUND
DRUG ABUSE DILEMMA

CHICAGO—Laboratories using urine screening tests to detect the presence of methadone, barbiturates, amphetamines, cocaine and other drugs are yielding unreliable results, according to a report in Friday's *Journal of the American Medical Association*.

Hugh J. Hansen, PhD, and colleagues of the Centers for Disease Control (CDC), Atlanta, describe the results of a blind study and four previous studies conducted by the CDC in conjunction with the National Institute on Drug Abuse to monitor laboratory error rates in routine patient urine samples. In the latest study (conducted in 1981), 100 urine samples containing small amounts of various drugs were sent to 13 laboratories that served a total of 262 methadone treatment centers. The researchers report that 91 percent of the labs had unacceptable false-negative rates for barbiturates, 100 percent for amphetamines, 50 percent for methadone, 91 percent for cocaine, 15 percent for codeine and 92 percent for morphine.

"Error rates for the 13 laboratories on samples containing barbiturates, amphetamines, methadone, cocaine, co-

deine, and morphine ranged from 11 to 94 percent, 19 to 100 percent, 0 to 33 percent, 0 to 100 percent, 0 to 100 percent and 5 to 100 percent, respectively," the researchers say. "Similarly, error rates on samples not containing these drugs (false-positives) ranged from 0 to 6 percent, 0 to 37 percent, 0 to 66 percent, 0 to 6 percent, 0 to 7 percent and 0 to 10 percent, respectively."

The researchers conclude from these blind tests that laboratories take greater care with known evaluation samples and achieve more accurate results than with routine samples. In two earlier tests, samples were mailed directly to the labs, and the percentage of drugs detected ranged from 76 to 100 percent. When test samples were introduced into the lab without notification, however, the percentage at the same labs ranged from 11 to 100 percent.

Laboratories are often unable to detect drugs at concentrations called for by their contracts, and the observed underreporting of drugs may threaten the treatment process, the researchers say. "While the results reflect serious shortcomings in the laboratories, the laboratories are only a part of a complex picture involving also the treatment centers, the clients, and the local, state, and federal governments." They recommend that blind testing be conducted routinely by those responsible for drug treatment to assess the quality of service provided by laboratories, noting that such testing could be greatly enhanced by automation and computer use.

Crisis in Drug Testing

Results of CDC Blind Study

Hugh J. Hansen, PhD; Samuel P. Caudill, PhD; D. Joe Boone, PhD

From the Clinical Chemistry and Toxicology Section, Performance Evaluation Branch, Division of Technology Evaluation and Assistance (Drs Hansen and Boone), and Management Development and Consultation Division (Dr. Caudill), Laboratory Program Office, Centers for Disease Control, Atlanta. Dr. Hansen is now with the National Institute for Occupational Safety and Health, Centers for Disease Control, Atlanta.

Reprint requests to Centers for Disease Control, Bldg. 6, Room 316, 1600 Clifton Rd NE, Atlanta, GA 30333 (Dr. Boone).

• In response to questions about the reliability of the results of screening urine for drugs, we evaluated the performance of 13 laboratories, which serve a total of 262 methadone treatment facilities, by submitting preferenced samples through the treatment facilities as patient samples (blind testing). Error rates for the 13 laboratories on samples containing barbiturates, amphetamines, methadone, cocaine, codeine, and morphine ranged from 11% to 94%, 19% to 100%, 0% to 33%, 0% to 100%, 0% to 100%, and 5% to 100%, respectively. Similarly, error rates on samples not containing these drugs (false-positives) ranged from 0% to 6%, 0% to 37%, 0% to 66%, 0% to 6%, 0% to 7%, and 0% to 10%, respectively. These blind tests indicate that (1) greater care is taken with known evaluation samples than with routine samples, (2) laboratories are often unable to detect drugs at concentrations called for by their contracts, and (3) the observed underreporting of drugs may threaten the treatment pro-

cess. Drug treatment facilities should monitor the performance of their contract laboratories with quality-control samples, preferably through blind testing.

(JAMA 1985; 253:2382-2387)

FROM 1972 through 1981, the Centers for Disease Control (CDC), in conjunction with the National Institute on Drug Abuse, conducted a proficiency testing (PT) program for drugs-of-abuse screening laboratories.¹ In this program, ten drug-spiked urine samples were mailed quarterly to each participating laboratory (each laboratory received 40 "mailed PT" samples per year). The participants in the program tested the samples for the requested drugs and submitted a report for grading on each quarterly survey by the cutoff date. If at least 80% of the responses were correct, the laboratory was classified as "satisfactory"; otherwise, the laboratory was classified as "unsatisfactory."

Early in the program, allegations were made that some laboratories were not subjecting mailed PT samples to the same testing procedures as their routine patient samples. These claims prompted two CDC studies in which data were collected through an alternative mode of PT—the blind test. This mode of testing requires the use of a dedicated surrogate office to introduce the test samples into the laboratory without the laboratory's knowledge (for example, a physician's office or a drug treatment facility). In these studies (one in 1973, with 24 laboratories, and another in 1975, with nine laboratories), results of mailed PT were compared with blind PT laboratory perfor-

mance.² Although the percentage of drugs detected by laboratories in the two studies ranged from 76% to 100% (average, 98%) on mailed PT samples, the percentage on blind PT samples for the same laboratories testing identical samples ranged from 11% to 100% (average, 69%). Additional CDC blind studies (an initial study in 1978 conducted with the assistance of the Federal Bureau of Prisons and another in 1980 with the assistance of two treatment centers) provided results similar to those from the earlier CDC blind studies.³ The percentage of drugs detected by the six laboratories ranged from 37% to 74% (average, 61%).

Supportive of the CDC blind studies, other investigators have reported on blind studies that showed error rates of a magnitude comparable with those found by the CDC. In one such study, in 1976, Gottheil et al⁴ reported blind testing results for a drug-screening laboratory that detected only 65% of the drugs in the samples. The laboratory also reported 152 false-positive results occurring in 106 (66.5%) of the 160 samples.

With the background of previous studies that suggested a number of laboratories may have high error rates on routine patient samples, a blind study was undertaken with two primary objectives in mind: (1) to determine error rates that would reflect the laboratory error rates on routine patient samples and (2) to classify the laboratory's performance as acceptable or unacceptable on the basis of predefined drug-screening error rates.

Table 1.—Summary of Data on Drug or Drug Class Included in the 1981 Blind Study*

Drug or Drug Class	Centers for Disease Control's (CDC) MRLs, µg/mL	Concen- tration† Range, µg/mL	No. of Challenges	
			Drug	Total
Barbiturates				
Phenobarbital	1.0	1.0-2.0	26	38
Pentobarbital	1.0	1.2-3.0	5	
Secobarbital	1.0	1.0-2.0	7	
Amphetamines				
b-amphetamine	1.0	1.0-2.0	32	56
Methamphetamine	1.0	1.0-3.0	24	
Methadone				
Methadone (percent)	1.0	1.0-2.0	44	88
Methadone (metabolite)‡	1.0	1.0-2.0	44	
Cocaine				
Cocaine (parent)	2.0	2.0-4.0	23	57
Cocaine (metabolite)§	4.0	4.0-5.0	34	
Opiates				
Codeine	0.5	0.6-2.0	40	118
Morphine (parent)"		0.1-0.8	39	
Morphine (metabolite)¶		0.9-1.8	39	
Others#				
Phencyclidine hydrochloride (PCP)	1.0	0.3-4.3	24	67
Methaqualone (Quaalude)		1.0-2.0	27	
Pentazocine (Talwin)		1.0-2.0	11	
Propoxyphene hydrochloride (Darvon)		3.0	3	
Cannabinoid (Δ ⁹ -metabolite)		0.2	2	

*The minimum reporting levels (MRLs), concentration range, and the number of samples containing a particular drug.

†Concentrations below the CDC's MRLs were not used in the evaluation.

‡2-Ethyl-1.5-dimethyl-3.3-diphenylpyrrololium perchloate.

§Benzoylcegonine.

"The MRL for total morphine was 0.5 µg/mL. No sample had less than 1.0 µg/mL.

¶Morphine glucuronide.

#No: considered in evaluation.

Table 2.—Sampling Plans and Associated Probabilities for the Centers for Disease Control Blind Study (Positive Challenges Only)

Drug or Drug Class	Sam- pling Plan*		<i>P</i> of Acceptable Classification†			
	n	r	FNR = 0.05	FNR = 0.10	FNR = 0.20	FNR = 0.25
Barbiturates	38	4	.96	.67	.10	.02
Amphetamines	48	4	.91	.47	.02	.003
Methadone	45	4	.93	.53	.04	.01
Cocaine	34	3	.91	.55	.07	.02
Codeine	42	4	.94	.59	.06	.01
Morphine	40	4	.95	.63	.08	.02

*n indicates the intended number of positive challenges; r, the maximum number of false-negatives allowable for acceptable classification.

† FNR indicates false-negative rate (i.e., the relative frequency in routine testing with which a laboratory concludes that a positive [drug present] sample is negative [drug absent]).

METHODS

Selection of Laboratories

The primary factor in selecting the laboratories included in this study was the number of methadone centers they served and not their previous performance on mailed PT or reports of poor performance from treatment programs. The number of methadone centers served by the selected laboratories ranged from four to 83 and spanned 26 states. The 13 laboratories selected served a total of 262 methadone centers. Although all laboratories in the mailed PT program were informed that selected laboratories would be surveyed in blind studies, the specific laboratories selected were not notified of their selection.

Sample Preparation

Each laboratory in the study received 100 urine samples. Each sample was selected from stock samples previously analyzed in the CDC's mailed PT program by 450 toxicology laboratories, including 40 reference laboratories. Each sample was prepared from human urine that had been screened by thin-layer chromatography and found to be free of the drugs being tested for in this study. The urine pool was prefiltered through a 0.22- μ m membrane. Drugs or their metabolites in their salt form were added quantitatively to provide the concentrations shown in Table 1. Each pool was sterilized by filtration and dispensed aseptically into 60-mL vials. The samples were then stored at 44° C until they were shipped to the treatment facilities. The samples were reanalyzed at the end of the study, and the initial concentrations were confirmed.

Minimum Reporting Levels

The CDC Mailed Proficiency Testing Program provides minimum reporting levels with each PT survey. All drug concentrations above the minimum reporting levels are to be reported positive: those below, negative. The CDC's minimum reporting levels (Table 1) were decided on by a peer review committee established by the National Institute on Drug Abuse, which consisted of consultants selected from the ranks of nationally known toxicologists. All laboratories included in this survey were able to detect drugs at the minimum reporting levels listed in the quarterly mailed surveys, as evidenced by satisfactory performance in the mailed surveys.

Study Design and Analysis

The CDC blind study was designed to classify (with $P \geq 90$) laboratories with a false-negative rate (FNR) and a

false-positive rate (FPR) of 0.05 or less as acceptable and to classify (with $P \leq .05$) laboratories with FNR or FPR of 0.25 or greater as unacceptable. This objective was accomplished using "attribute acceptance sampling plans" to specify the number of positive (drug present) and negative (drug absent) samples to be tested by each laboratory for each drug and a rule for deciding whether a given laboratory has an acceptable FNR and FPR. For the purposes of this report, the acceptance sampling plans used were designed to classify laboratories as acceptable or unacceptable based only on their FNRs. This decision was made because false-negatives tended to occur much more frequently than false-positives and because the results when presented in this form are more amenable to comparison with results in previous studies.

The acceptance sampling plans for each drug or drug class are presented in Table 2, where n represents the number of positive challenges and r represents the maximum number of false-negatives a laboratory could have and still be classified as acceptable. Also presented in Table 2 are the probabilities with which laboratories with the associated FNR would be expected to be classified as acceptable based on the corresponding sampling plan. These probabilities give an indication of how well the various sampling plans should perform in discriminating between laboratories with various FNRs. Inspection of Table 2 will show that these plans can be expected to classify (with $P > .90$) laboratories with an FNR of 0.05 or less as acceptable and to classify (with $P \leq 0.10$) laboratories with an FNR of 0.20 or greater as acceptable. For example, a laboratory with an FNR of 0.05 for barbiturates would have a probability of about .96 of receiving an acceptable classification (ie, four or fewer false-negatives in a set of 38 samples containing barbiturates),

whereas a laboratory with an FNR of 0.20 for barbiturates would have a probability of only .10 of receiving an acceptable classification.

In the evaluation process, barbiturates and amphetamines were each treated as a class. The metabolites of methadone and cocaine were added to mimic a patient sample and were not treated separately. Morphine and codeine were treated separately. At the treatment facilities, the blind samples were intermixed among patient samples and thereafter treated exactly as patient samples. The number of blind samples entering the laboratory from any given treatment facility was not greater than 10% of the total number of samples submitted.

Table 3. — Laboratories With Acceptable Performance*

Drug or Drug Class	Total No. of Laboratories†	No. (%) of Laboratories With Acceptable Performance
Barbiturates	11	1 (9)
Amphetamines	12	0 (0)
Methadone	12	6 (50)
Cocaine	11	1 (9)
Codeine	13	2 (15)
Morphine	13	1 (8)

* Laboratories were considered acceptable for a particular drug based on the statistical design of the 1981 blind study.

† To ensure (with $P \geq .95$) that laboratories with a false-negative rate of 0.25 or more would be classified as unacceptable and to ensure (with $P \geq .90$) that laboratories with a false-negative rate of 0.05 or less would be classified as acceptable, only laboratories subjected to at least 29 positive challenges for a given drug or drug class were included.

Comparison of blind studies, 1973 through 1981, shown as the percentage of correct responses on positive challenges by drug: 1973, Centers for Disease Control (CDC), 24 laboratories; 1975, CDC, nine laboratories; 1976, Jefferson Medical College, one laboratory (see reference 4); 1978, CDC, four laboratories; 1980, CDC, two laboratories; 1981, CDC, 13 laboratories. (Supporting data for this figure contained in Table 4.)

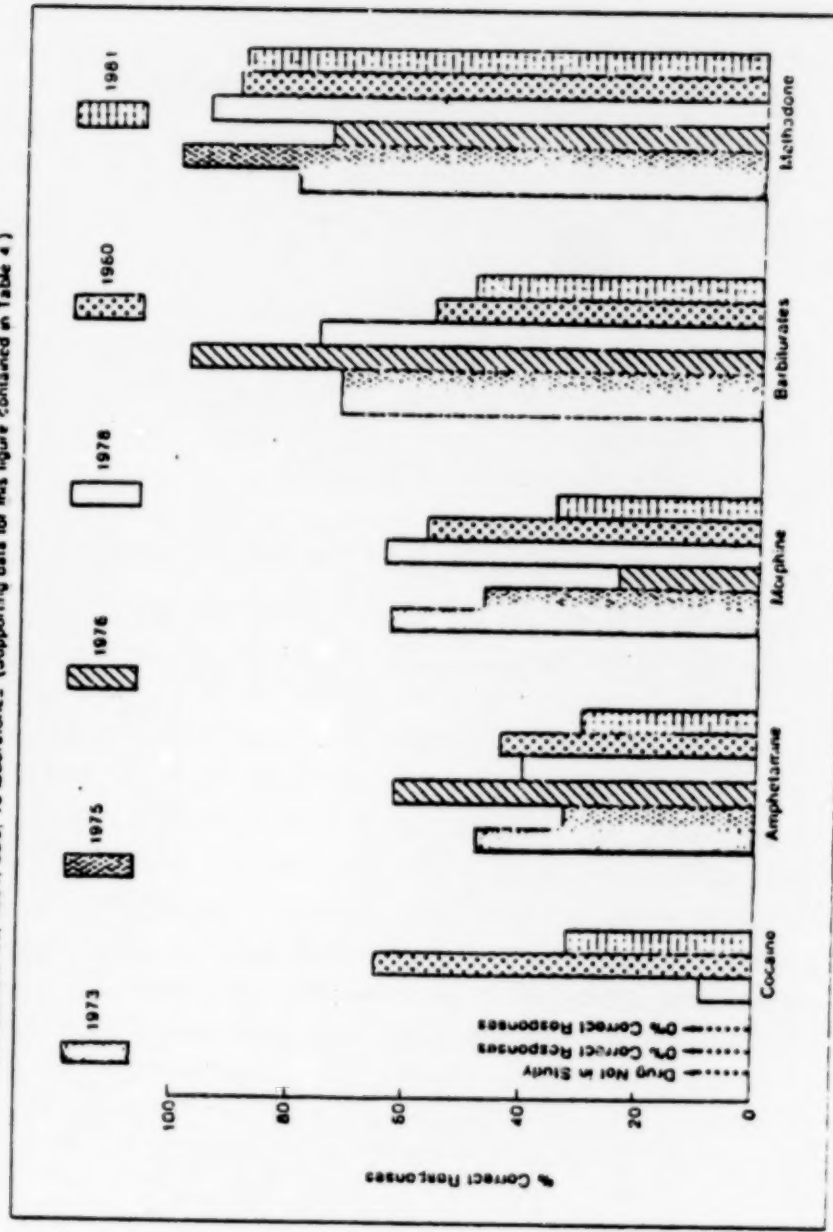


Table 4. — Supporting Data for the Figure: Number of Positive Drug Challenges and Percentage of Correct Responses by Drug by Year*

Drug or Drug Class	1973, 24		1975, 9		1976, 1		1978, 4		1980, 2		1981, 13	
	Laboratories;	No. (%)	Laboratories;	No. (%)	Laboratory;	No. (%)	Laboratories;	No. (%)	Laboratories;	No. (%)	Laboratories;	No. (%)
Cocaine	Not included	7† (0)			66 (0)		90 (9)		85‡ (65)		412 (32)	
Amphetamines	82 (48)		9 (33)		66 (62)		105 (40)		169 (44)		566 (30)	
Morphine	111 (63)		45 (47)		66 (24)		120 (64)		164 (57)		470 (35)	
Barbiturates	110 (72)		36 (72)		66 (98)		165 (76)		160 (56)		456 (49)	
Methadone	100 (80)		54 (100)		66 (74)		105 (95)		134 (90)		538 (89)	

* Percentages were obtained by dividing the total number of correct responses by the total number of positive drug challenges.

† Only seven of the nine laboratories in the study offered a service for testing for cocaine.

‡ Data were available from only one laboratory for cocaine testing.

Table 5. — Summary of Results on Positive Samples by Drug or Drug Class From Blind Study*

Laboratory	Drug or Drug Class											
	Barbiturates		Amphetamines		Methadone		Cocaine		Codeine		Morphine	
	No.	%	CRR, %	CI, %	No.	%	CRR, %	CI, %	No.	%	CRR, %	CI, %
A	38	16	6-31	47	0	0-8	44	73	57-85	34	0	6-10
B	38	50	33-67	47	74	60-86	44	89	75-96	34	76	59-89
C	38	89	75-97	47	81	67-91	44	100	92-100	34	0	0-10
D	38	26	13-43	47	43	28-58	44	91	78-97	34	9	2-24
E	18	6	0-24	20	20	6-44	28	86	67-96	20	90	68-99
F	38	16	6-31	47	0	0-8	44	98	90-100	34	0	0-10
G	19	16	3-40	31	65	45-81	24	67	45-84	18	0	0-19
H	37	46	29-63	44	11	4-25	45	78	63-89	32	19	7-36
I	38	21	10-37	47	0	0-8	44	100	92-100	34	0	0-10
J	40	43	29-59	48	13	5-25	45	93	82-99	36	61	43-77
K	38	63	46-78	47	40	26-56	44	100	92-100	34	100	90-100
L	38	61	43-76	47	6	1-18	44	89	75-96	34	32	17-51
M	38	84	69-94	47	47	32-62	44	86	73-95	34	38	22-56

* The number of samples, the correct response rate (CRR), and the 95% confidence interval (CI), on the CRR for the 13 laboratories in the Centers for Disease Control blind study. Confidence intervals were computed based on the binomial probability distribution.

Table 6. — Summary of Results on Positive Samples by Drug or Drug Class From Mailed Proficiency Testing Surveys 1979 II through 1981 I*

Laboratory	Drug or Drug Class											
	Barbiturates		Amphetamines		Methadone		Cocaine		Codeine		Morphine	
	No.	%	CRR, %	CI, %	No.	%	CRR, %	CI, %	No.	%	CRR, %	CI, %
A	35	100	98-100	32	97	86-100	30	100	88-100	29	68	48-84
B	19	100	82-100	19	95	77-100	19	100	82-100	17	100	81-100
C	39	100	91-100	36	97	88-100	34	100	90-100	31	100	89-100
D	39	100	91-100	36	100	90-100	34	100	90-100	32	84	67-95
E	39	95	83-99	36	100	90-100	34	97	87-100	32	97	86-100
F	39	97	89-100	36	92	78-98	34	100	90-100	31	97	86-100
G	34	100	90-100	32	100	89-100	29	100	88-100	25	100	86-100
H	39	95	83-99	36	83	67-94	34	100	90-100	31	100	89-100
I	39	97	89-100	36	100	90-100	31	100	89-100	31	100	89-100
J	34	97	87-100	31	94	79-99	29	100	88-100	25	96	82-100
K	39	92	79-98	36	97	88-100	34	100	90-100	31	97	86-100
L	39	100	91-100	36	94	81-99	34	100	90-100	31	100	89-100
M	39	97	89-100	36	94	81-99	34	100	90-100	31	87	70-96

* The number of samples, the correct response rate (CRR%), and 95% confidence interval (CI), on the CRR for each of the 13 laboratories in the Centers for Disease Control 1981 blind study. Confidence intervals were computed based on the binomial probability distribution. Quarterly surveys are designated by the numbers I through IV.

† Service not offered for these drugs.

RESULTS

The number and percentage of laboratories whose performance was found acceptable on a particular drug according to the acceptance sampling plan described in Table 2 are shown in Table 3. A graphic comparison by drug or drug class of the overall correct response rates of the 13 laboratories in the 1981 CDC blind study with those obtained in the aforementioned five previous studies is presented in the Figure, with supporting data summarized in Table 4.

A summary of results on positive samples by drug for each laboratory in the blind study is provided in Table 5. Similarly, a summary of results on positive samples used in mailed PT surveys 1979 II through 1981 I are listed by drug for each laboratory in Table 6 (quarterly surveys are designated by a number I through IV). Although not listed, there were at least 36 non-drug-containing (negative) samples for each of the drugs per laboratory in both blind and composite mailed PT surveys (except for laboratories B and F in the mailed surveys). A summary of correct response rates on both positive and negative samples is listed in Tables 7 and 8 for the blind study and for the composite of mailed surveys. All laboratories in the study had satisfactory scores in the mailed PT survey before the blind test was performed.

For the drugs used in the evaluation, an increase in correct response rate on positive samples with increased drug concentration was suggested by a χ^2 goodness-of-fit test for the drugs—barbiturates ($P < .002$), morphine ($P < .008$), and codeine ($P < .009$)—test results were not significant for o-amphetamine and methadone; methamphetamine and cocaine did not have a range of concentrations amenable to analysis.

COMMENT

The results presented in this article show that the laboratories in the study missed a substantial number of the drug challenges. While the results reflect serious shortcomings in the laboratories, the laboratories are only a part of a complex picture involving also the treatment centers, the clients, and the local, state, and federal governments. As early as 1972, Finkle mentioned the lack of common standards or operational guides among treatment facilities and the absence of "regulations" for analytical practice in the laboratories. Our observations confirm that little has changed even a decade later; contracts between treatment facilities and laboratories lack uniformity in minimum reporting levels, minimum quality-control requirements, and reporting procedures for results. Some treatment facility directors were knowledgeable about the content of their laboratory contracts, but others appeared to have only superficial knowledge of the contract or had no written contract at all.

A possible factor in laboratory behavior resulting in the high level of false-negative errors reported herein may be laboratory perceptions of the kind of results that substantiate progress in the treatment setting. Specifically, negative results are an indicator of successful treatment and the compliance of the patient as well. In addition, they justify the public expenditures for such types of treatment, decrease laboratory costs, and reduce the likelihood that legal means will need to be pursued.

The laboratory behavior leading to low correct response rates on blind samples and generally higher correct response rates on mailed samples does not appear to be the avoidance of testing ("sink testing") in the blind studies; rather, the data suggest less sensitive testing. For example,

Table 7. — Comparison of Laboratory Performance on Positive Samples From Blind Study and Mailed Surveys.*

Drug or Drug Class	Blind Study			Mailed PT		
	Average No. of Challenges per Laboratory	Average CRR, %	CRR Range, %	Average No. of Challenges per Laboratory	Average CRR, %	CRR Range, %
Barbiturates	35	41	6-89	36	98	92-100
Amphetamines	44	31	0-81	34	96	92-100
Methadone	41	88	67-100	32	100	97-100
Cocaine	32	36	0-100	28	98	87-100
Codeine†	37	45	0-100	30	91	68-100
Morphine†	36	38	0-95	30	89	69-100

* Correct response rates (CRRs) for 13 laboratories in the Centers for Disease Control test data: 1981 blind study and mailed proficiency testing (PT) surveys 1979 II through 1981 I (quarterly surveys are designated by the numbers I through IV). Laboratory A did not participate in mailed PT survey for 1981 I.

† Service for these drugs was not offered by laboratory F.

86

Table 8. — Comparison of Laboratory Performance on Negative Samples From Blind Study and Mailed Surveys.*

Drug or Drug Class	Blind Study			Mailed PT		
	Average No. of Challenges per Laboratory	Average CRR, %	CRR Range, %	Average No. of Challenges per Laboratory	Average CRR, %	CRR Range, %
Barbiturates	53	100	94-100	38	100	98-100
Amphetamines	49	97	63-100	41	99	97-100
Methadone	51	88	34-100	43	100	98-100
Cocaine	61	99	94-100	46	100	98-100
Codeine†	55	99	93-100	44	99	95-100
Morphine†	56	98	90-100	44	93	92-100

* Correct response rates (CRRs) for 13 laboratories in the Centers for Disease Control test data: 1981 blind study and mailed proficiency testing surveys 1979 II through 1981 I (quarterly surveys are designated by numbers I through IV). Laboratory A did not participate in mailed proficiency testing survey for 1981 I.

† Service for these drugs was not offered by laboratory F.

87

methadone has the highest correct response rate for both blind and mailed surveys, whereas amphetamines have the lowest for both surveys. This agreement in both testing modes suggests that the minimum reporting levels are higher (less sensitive) in routine testing than in mailed PT. Less sensitive testing may be the primary factor responsible for the high FNRs and comparatively lower FPRs. Less sensitive testing (which means that more drugs will be missed) may result from methodological design, personnel problems, or the reimbursement process. Because contacts are generally awarded to the lowest bidder, with no prior assessment of testing quality, inadequate reimbursement for services may induce the need for a higher throughput of patient samples. If realistic fee schedules were established for drug tests, perhaps more reliable procedures would be established and better-trained personnel would be hired, leading to higher-quality testing.

A large portion of treatment program budgets is spent on urine testing.⁷ In 1976, Gottheil et al⁴ projected that 30 million urine samples would be tested. Based on this figure and the error rate range that we have observed in blind studies (37% to 69%), the losses resulting from erroneous results alone would range from \$37.2 million to \$75.6 million. For urine testing to continue as a major instrument in drug treatment facilities, responsible clinicians and treatment directors should move to curb the waste of private and governmental expenditures. Our experience shows that remarkable improvements may be obtained through effective contracting with laboratories followed by monitoring of the quality of services received.

In recent years, the CDC has demonstrated that high-quality urine testing can be obtained from drug-screening laboratories when they are monitored by blind testing. The use of blind testing as a monitoring instrument for large

screening laboratories produced substantial improvements in laboratory performance. Blind testing is highly regarded as a means of obtaining estimates of laboratory error rates.¹⁰

These studies demonstrate the effectiveness of blind testing as an objective monitoring tool. In this assessment 91% of the laboratories had unacceptable FNRs for barbiturates; 100% for amphetamines; 50% for methadone; 91% for cocaine; 15% for codeine; and 92% for morphine. With automation and computerization such evaluations obtained by monitoring could be reduced to routine activity. Blind testing should be implemented by all those responsible for drug treatment to periodically assess the quality of service being provided.

This study was supported by an interagency agreement with the National Institute on Drug Abuse.

We gratefully acknowledge the assistance of the staff of the Clinical Chemistry and Toxicology Section who prepared the samples used in these studies and the staff of the treatment facilities who provided their time and resources to make this study possible.

References

- ¹ Boone DJ, Guerrant GO, Knouse RW: Proficiency testing in clinical toxicology: Program sponsored by the Centers for Disease Control. *J. Anal Toxicol* 1977;1:137.
- ² LaMotte LC, Guerrant GO, Lewis DS, et al: Comparison of laboratory performance with blind and mail-distributed proficiency testing samples. *Public Health Rep* 1977;92:554-560.
- ³ Boone DJ, Hansen JH, Hearn TL, et al: Laboratory evaluation and assistance efforts: Mailed, on-site, and blind proficiency testing surveys conducted by the Centers for Disease Control. *Am J Public Health* 1982;72:1361-1368.

⁴ Gottheil F, Caddy GR, Austin DL: Fallibility of urine drug screens in monitoring methadone programs. *JAMA* 1976;236:1035-1038.

⁵ Duncan AJ: *Quality Control and Industrial Statistics*, ed 4. Homewood, Ill, Richard D Irwin Inc, 1974, pp. 155-178.

⁶ Finkle BS: Forensic toxicology of drug abuse: A status report. *Anal Chem* 1972;44:18A.

⁷ Goldstein A, Horns WH, Hansteen RW: Is on-site urine testing of therapeutic value in methadone treatment program? *Int J. Addict* 1977;12:717-728.

⁸ Jain NC, Sneath TC, Budd RD: Blind proficiency testing in urine drug screening. The need for an effective quality control program. *J Anal Toxicol* 1977;1:142-146.

⁹ Mason MF: Some realities and results of proficiency testing of laboratories performing toxicological analyses. *J Anal Toxicol* 1981;5:206-208.

¹⁰ Shoemaker MJ, Klein M, Sideman L: Drug abuse proficiency testing in Pennsylvania 1972-1976. *J Anal Toxicol* 1977;1:130-138.

PLAINTIFF'S EXHIBIT 3

EXPRESS-NEWS SAN ANTONIO, TX THURSDAY,
SEPTEMBER 19, 1985



Photo by JOE BARRERA, JR.

A CRANE WORKS TO REPLACE SECTIONS OF THE MEDINA RIVER BRIDGE . . . Southern Pacific freight cars damaged the bridge when they derailed

Railroad knew of danger
before spill, employees say

By JEFF DAVIS
Express News Staff Writer

Experienced trainmen said Wednesday a Southern Pacific train derailed and sulfuric acid spilled because a railroad official ordered trainmen to take a "bad load"—bridge timbers not attached to their flatcar.

The bridge timbers shifted to the right late Saturday and struck the south girders of the Medina River bridge when the eastbound train crossed a known "dip" in the south rail

on the wooden trestle approach to the steel span, an engineer said Wednesday.

Three Southern Pacific employees—on condition they not be identified—revealed these and other factors which they say led to the accident, which caused 50,000 gallons of the toxic chemical to spill into the river.

The three, none of whom were crewmen on the train that derailed, predicted railroad officials would try to blame the derailment on employee error after a hearing which began Wednesday.

The trainmen confirmed:

- At least three separate westbound trains spotted a swaying car on the eastbound freight Saturday and radioed a warning to Gary Baird, conductor of the train that later derailed.

"That car was bad ordered—ordered out of service—in El Paso. Some petty official told them, 'It's not that bad, take it.'"

"'Gary, you've got a shifted load,' I heard my conductor tell him," said one railroad employee. "Baird came back and said, 'Yeah, we know about it but they said to take it.'"

- An engineer said he noticed in June a severe dip in the south rail as his eastbound locomotive crossed the wooden trestle approaching the Medina River bridge.

"The whole train leaned to the right, just before the bridge," he said. "I notified the dispatcher and he said they'd put a 20 mph 'slow order' on it. This was at least two months before that arson, before somebody set that car on fire beneath the trestle."

Volunteer firemen Saturday said the derailment might have been caused by incomplete repairs to the scorched trestle after a car was set afire beneath it Aug. 28.

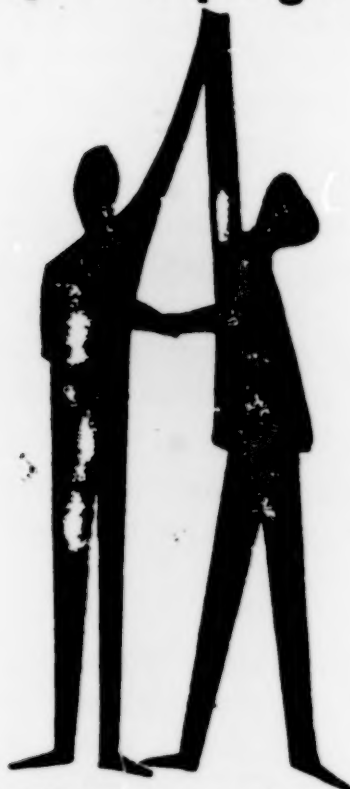
- The timber-carrying flatcar was first noticed and called to the railroad's attention in Tucson, Ariz; another trainman said. He said an inspector took the car out of service in El Paso but the inspector was overruled by another official.

"That car was bad-ordered—ordered out of service—in El Paso," he said. "Some petty official told them, 'It's not that bad, take it.'"

- The bridge timbers, 12 inches by 12 inches and 12 to 20 feet long, were tied in bundles of nine or 12 each, but the bundles were not attached to the car, the trainmen said.

"They were just laying up there and the vibration from the trip could have moved them around," a veteran trainman said.

PLAINTIFF'S EXHIBIT 5

People Helping People

**What every UTU member should know about
Employee Assistance Programs**

united transportation union 
PR SERIES No. 9

**UTU POLICY ON ALCOHOLISM
AND DRUG DEPENDENCY**

We sympathize with any man or woman who has a problem with either alcohol or drugs. About 18% of all Americans have such problems.

We want to help those who need help and also provide a safer work place for the great majority who do not have the problem.

You are entitled to a safe environment within which to carry out your work activities. When this environment is threatened by the unwise use of alcohol or drugs, you have a right to demand its uprooting from the work place, and the UTU's policy is to support you in these efforts.

To adequately deal with this problem requires a firm commitment on the part of labor and management to support soundly developed and administered Employee Assistance Programs that operate on the principle of "shape up or ship out"—not ship out and then shape up. We don't have as many of these sound programs as we need, and until we get them, we will always be threatened by the fetters of Federal regulations.

We need and solicit your support in working with other like-minded people in pursuit of our goal to get these programs going where they don't exist, and to make them better where they do.

People who need help will get it, and a safer place for all to work will result, and the need for Federal intervention will disappear.

Fred A. Hardin
International President

**NECESSARY INGREDIENTS FOR
AN EFFECTIVE
EMPLOYEE ASSISTANCE PROGRAM**

1. An understanding of chemical dependency as a health problem.
2. Intervention on the basis of diminished job performance and rule violations.
3. Threat of dismissal used as leverage to get people into programs.
4. Adequate referral mechanisms.
5. Competent people to assess and refer.
6. Assurance of job retention for successfully rehabilitated problem drinkers.
7. Use of outpatient treatment agencies.
8. Adequate insurance coverage.
9. Integral role for labor.
10. Systematic ongoing evaluation.
11. Confidentiality.
12. Better record keeping to serve evaluation, confidentiality and insurance needs.
13. Adequate program promotion efforts.
14. Reducing the incidents of drinking problems, i.e., prevention

ABOUT THIS BOOKLET . . .

The United Transportation Union for the past 15 years has been in the forefront in the development and implementation of Employee Assistance Programs.

The UTU has been in the front ranks of those seeking answers to the different and difficult problems of alcohol and other drug dependencies that adversely affect the health and lives of many Americans. Some of these victims are to be found in our industry, in our union and in our homes. Because they need help we offer ours.

Our concern about this major health problem has been translated into involvement in effective company-based programs called employee assistance programs. These programs are designed to help those among us unfortunate enough to be caught in or headed for the addictive web of alcohol or other drugs.

Concern for the safety, health and well-being of our members and their families is reason enough for all of us to cooperate in the development and implementation of these "helping hand" programs of human restoration.

Coping with the problems of chemical abuse or dependency is not, in the final analysis, a labor or a management problem. It is a human and a family problem that looks for its solution within our industry, within our union and in the larger community of mankind.

Everyone in the United Transportation Union family should be committed to the development and implementation of these people-serving programs.

TABLE OF CONTENTS

	Page
What is Alcoholism or Drug Dependency?	1
How EAP standards were set	4
Standards for EAPs	7
Operation Red Block	12
Insurance for treatment of alcoholism	14
Railroads with EAPs	15
The UTU recommends	16

WHAT IS ALCOHOLISM OR DRUG DEPENDENCY?

What is alcoholism and how do I recognize it when I see it?

Defined by the American Medical Association and the World Health Organization as a disease, alcoholism is uncontrolled drinking. It is a state of drinking where alcohol becomes the be-all and end-all of existence. In its chronic, addictive state one drink inevitably leads to another, and then another until a condition of total intoxication or stupor is reached. In contrast, responsible use of alcoholic beverages is characterized by the appropriateness of the occasion and a consideration of one's personal welfare and that of others. Uncontrolled, destructive drinking marks the alcoholic.

During the course of its development, which ranges from months to years, personal health, work, family and social relations are all jeopardized. Finally, even the familiar, commonplace things like driving a car, or organizing a household, are no longer manageable. If alcoholism does not always have a clear-cut beginning, its end is all too certain—physical and mental disability, death.

The course of alcoholism takes many twists and turns. There are cases where the alcoholic may remain sober for weeks, even months. Such periodic attempts by the alcoholic to stay sober in the effort to demonstrate that drinking is under control can be a symptom of the illness. The alcoholic may be trying to pretend he can control his drinking when really he can't. Despite long periods of abstinence, the alcoholic usually returns to his uncontrolled drinking when he resumes drinking.

Drug abuse, because it takes many forms and involves many different kinds of substances, is not easy to define.

Drug abuse may refer to the consumption, without medical authorization, of medically useful drugs which have the capacity to alter mood or behavior. It may also refer to the ingestion of a medically useful mood-altering drug for a purpose other than that for which it was prescribed.

Drug abuse also describes any use—except for medical research—of mind-changing drugs and substances having no legitimate medical application.

Employees who are drug abusers do everything possible to conceal their habits. Therefore, it is important to recognize the signs, symptoms and paraphernalia of drug abuse.

COMMON SYMPTOMS OF ALCOHOLISM

Alcoholics differ in backgrounds and experiences. There are, however, certain common symptoms and behavior patterns that identify the alcoholic. It would be rash to make a judgment based on such surface signs as a flushed face, bleary eyes, and slurred speech. These may be present, but a combination of the following symptoms is a more certain sign of destructive drinking:

- The inability to stop at one or two drinks
- Increased dependency on alcohol
- The inability to remember what occurred during drinking bouts
- Passing out when drinking
- Drinking alone
- The need for a drink the next morning
- Feelings of guilt and remorse
- Attempts to hide drinking
- Increase in the amount of alcohol consumed
- "Gulping" drinks
- Lateness and absenteeism at work

- Neglect or indifference to personal appearance
- Neglect of other financial obligations to pay for alcohol
- Family quarrels and family tensions over drinking
- Lateness in returning home with a growing number of excuses (or, perhaps offering no excuse at all)
- Changes in eating and sleeping habits
- Increased irritability
- Hostile and belligerent behavior when drinking
- Hand tremors and increased nervousness
- Falling, stumbling, or other types of unstable behavior
- Hiding and protecting liquor supply
- Repeated attempts at abstinence
- The angry denial that one has a drinking problem, usually accompanied with a strong "alibi system" to excuse, explain, or minimize increased drinking
- In its terminal phases, impairing such vital organs as the brain, liver, and gastrointestinal system

COMMON SYMPTOMS OF DRUG ABUSE

1. Changes in attendance and discipline.
2. Unexplained changes in the performance of work or responsibilities.
3. Unusual flare-ups or outbreaks of temper.
4. Poor physical appearance including inattention to dress or personal hygiene.
5. Wearing of sunglasses at inappropriate times to hide dilated or constricted pupils.
6. Unusual effort made to cover arms in order to hide needle marks.
7. Association with known drug abusers.
8. Borrowing of money from other employees to purchase drugs.

9. Stealing small items from work that can be readily sold for cash (to support habit).
10. Finding the employee in odd places during normal working hours such as closets, storage rooms and excessive time in the lavatory.

HOW CURRENT EAP STANDARDS WERE SET

Historical Background

The need for employee alcoholism/assistance program standards has long been recognized by the major organizations in the occupational alcoholism field—the Association of Labor-Management Administrators and Consultants on Alcoholism (ALMACA), the National Council on Alcoholism (NCA), the National Institute on Alcohol Abuse and Alcoholism (NIAAA) and the Occupational Program Consultants Association (OPCA).

At NCA's Annual Forum in St. Louis, Missouri, in 1978, six individuals from six different agencies made a joint presentation entitled, "Issues of the Day." Although the papers had all been prepared independently of one another, the same need was perceived by all six participants—a need for a set of standards which could be used to evaluate existing occupational alcoholism programs.

Earlier in 1978, NCA's Labor-Management Committee had instructed NCA staff to help develop program standards for evaluation purposes. A subcommittee was named to work on this project. During the data-gathering process, the NCA staff became convinced that any program standards developed unilaterally by them (or by any panel chosen exclusively by them) would not be nearly as effective as similar standards developed by a group with a much broader base.

For this reason, NCA called a meeting at its Annual Forum in Washington, D.C. in 1979, to which it invited representatives of ALMACA, the federal government and organized labor. The joint decision of this group was to form a blue-ribbon committee to develop occupational alcoholism program standards. The committee was to be chosen in this way: Five members were to be named by NCA; five by ALMACA; three by labor, and two by the federal government. It was further decided that NCA and ALMACA would each name three corporate program heads, one private consultant and one individual who was operating a consortium. A representative was also to be named by OPCA.

The blue-ribbon Program Standards Committee held its first meeting in New York City on January 14, 1980.

Committee List

The following are the names of those who currently serve on the Standards Committee:

Mary Bernstein, Manager
Special Health Services, East
Trans World Airlines, Inc.
Jamaica, N.Y.

Doris E. Cohen, Executive Director
NCA-Delaware Valley Area, Inc.
Philadelphia, PA

Bill Combs, Director
Alcoholism Program
District 141, I.A.W., A.W.
Belmont, CA

John J. Connors
New England Gas & Electric
Cambridge, MA

John Gorman, Manager
Employee Assistance Program
Conrail
Philadelphia, PA

Herman J. Heise, Director
Employee Assistance Program
The Denver & Rio Grande Railroad Co.

John J. Hennessy, Director
Alcoholism Program
N.Y.S.A. - I.L.A.
New York, N.Y.

James J. Murphy, President
Operation Recovery, Inc.
Baltimore, MD

James Roth, Program Consultant
Contact, Inc.
Phoenix, AZ

Donald Sandin, President
Donald Sandin & Associates
New York, N.Y.

Darrell D. Sorenson, Director
Employee Assistance Program
Union Pacific Railroad Company
Omaha, NE
(Committee Chairman)

Terry York, Admn/Counselor
International Communication Agency
Washington, D.C.

Consultants

Thomas Delaney
Executive Director
ALMACA
Suite 907
1800 N. Kent Street
Arlington, Virginia 22209
(703) 522-6272

William S. Dunkin
Director
Labor-Management Services
National Council on Alcoholism, Inc.
733 Third Avenue
New York, N.Y. 10017
(212) 986-4433

Donald F. Goodwin
Chief, O.P.B.
NIAAA, Parklawn Building
Occupational Program Branch
5600 Fishers Ln., Room #11A-05
Rockville, Maryland 20857
(301) 443-1148

James R. O'Hair
Manager
Occupational Programs Unit
National Clearinghouse on Alcohol Information
P.O. Box 2345
Rockville, Maryland 20852
(301) 468-2600

James Pixley
 Alcoholism Council of California/NCA
 127 N. Madison
 Suite #203
 Pasadena, California 91101
 (213) 499-5611

Former Consultants

James Baxter
 Formerly, Executive Director
 ALMACA

W.G. "Chief" Brant
 Formerly NCA & AFL-CIO

John Codington
 Formerly NCA

STANDARDS FOR EMPLOYEE ALCOHOLISM AND/OR ASSISTANCE PROGRAMS

1. POLICY AND PROCEDURE

1.1 Policy Statement

An organization shall adopt a written policy statement on alcoholism and other problems covered by the EAP. This will be signed by the chief executive and union head where appropriate, and will reflect management and labor attitudes and agreements as to the Program's objectives. The policy should state that alcoholism is a disease responsive to treatment and rehabilitation and specifying the responsibilities of management, union representatives, and employees as they relate to the Program. The EAP need not in any way alter management's responsibility or

authority or union prerogatives. Participation in the EAP will not affect future employment or career advancement, nor will participation protect the employees from disciplinary action for continued substandard job performance or rule infractions.

1.2 Confidentiality

Written rules will be established specifying how records are to be maintained, for what length of time, who will have access to them, which information will be released to whom, and under what conditions, and what use, if any, can be made of records for purposes of research, evaluation and reports. Client records maintained by an EAP should never become part of an employee's personnel file. Adherence to Federal regulations on confidentiality of alcohol and drug abuse records (42 CFR Part 2) is required of Programs even indirectly receiving Federal funds.

1.3 Procedures for individuals referred by management and/or union representatives

Each EAP will prepare written procedures for action initiated by management and/or union representatives. This will provide an assessment by EAP staff, evaluation by professionals, referral for treatment, feedback to and from the referral source and follow-up. For alcoholism cases there should be a follow-up at least monthly for a minimum of one year.

1.4 Procedures for voluntary use of the Program by employees/family members

Procedures for individuals who refer themselves will provide for assessment by EAP staff, evaluation by professionals, referrals for treatment and follow-up. The Pro-

gram will initiate no contact with management concerning individuals who refer themselves, consistent with confidentiality regulations.

2. ADMINISTRATIVE FUNCTIONS

2.1 Organizational position of the EAP

Operation of or responsibility for the EAP should be positioned at an organization level high enough to insure the involvement of senior management and/or union leadership in sustaining the Program.

2.2 Physical location of the EAP

The physical location of the EAP should facilitate easy access while insuring confidentiality.

2.3 Record-keeping system

Each EAP will have a record-keeping system carefully designed to protect the identity of the client, while facilitating case management and follow-up and providing ready access to statistical information.

2.4 Relation of the EAP to medical and disability benefit plans

There should be a review of medical and disability benefits to insure that plans adequately cover appropriate diagnosis and treatment for alcohol, drug, and mental health problems. Where feasible, coverages should include outpatient and day treatment care. The EAP staff should be familiar with provisions of the medical and disability benefit plans so they can advise clients clearly as to the extent, nature and cost of the recommended treatment and reimbursement available.

2.5 Malpractice/liability insurance

The organization should contact a legal review of all aspects of the Program. The purpose is to ensure that there should be adequate protection for all EAP staff and the Organization against possible malpractice/liability claims.

2.6 Qualifications of EAP staff

The EAP staff should combine two primary qualifications:

1. Appropriate managerial and administrative experience.
2. Skills in identifying problems, interviewing, motivating, referring clients, and, where appropriate, in counseling or related fields. Experience and expertise in dealing with alcohol-related problems are essential.

3. EDUCATION AND TRAINING

3.1 Communicating EAP services to employees and their families

It is important that employees and their families are informed about the organization's EAP and the services it offers and are continually updated by various educational techniques on its existence and availability. Information about the EAP should be made available to all new employees and their families.

3.2 Employees education

An organization should have a major commitment to ongoing education about alcohol use and alcoholism. Additional efforts should be made to educate employees about other recognized problem areas.

3.3. Orientation of management and union representatives

Management and union representatives should be thoroughly informed about their key role in utilizing the EAP services. Orientation for management and union representatives should be updated regularly.

4. RESOURCES

4.1 Resource file on providers of assistance

Each EAP should maintain current information about alcoholism treatment services and other resources. These include Alcoholics Anonymous, Al-Anon, Alateen, and other self-help groups, appropriate health care, community services and other professionals.

5. EVALUATION

5.1 Program review and evaluation

There should be a periodic review of the Program to provide an objective evaluation of operation and performance.

5.2 Staff performance evaluation

There should be an annual evaluation review of EAP staff performance.

OPERATION RED BLOCK

Operation Red Block is a comprehensive drug and alcohol prevention program that urges employees to take personal responsibility in handling drug and alcohol use on the job.

The emphasis is on PREVENTION.

Operation Red Block compliments existing Employee Assistance Programs by making it possible to help employees rather than punish them.

Initiated by the UTU and BLE on the Union Pacific in 1983 with the support of UP management, Operation Red Block is based on the idea that most employees want to work in an environment free of the risks induced by alcohol and drugs.

The program, which has spread to several other railroads, is being promoted as an alternative to Federal rules on alcohol and drug problems.

The UP program encourages employees to say: "I've looked away long enough." In brochures and other promotional material, Operation Red Block is hailed as a program to save jobs, not take them away.

A brief description of UP's five-step Operation Red Block follows:

For as long as there has been a Rule "G", there has been that silent majority of employees who **want** to work in an environment free of the risks induced by alcohol and drugs.

Now the Brotherhood of Locomotive Engineers and the United Transportation Union and Union Pacific System are responding with a revolutionary, five-step drug and alcohol prevention program:

Step One — Policy Statement

Local organizations confirm through policy statements to members that they endorse their internationals' position: "We do not condone the use of alcohol or drugs while on duty."

Step Two — Prevention Committee

Participating locals form prevention committees to field complaints about members using drugs or alcohol while on duty. Committees insist that users quit and urge them

to contact an Employee Assistance Counselor if they need help.

Step Three – Rule “G” Bypass Agreements

Locals ratify a Rule G Bypass Agreement that allows members to confront other members who use drugs and alcohol while on duty and refer them to the Employee Assistance Program for counseling—all without loss of job, threat of punitive action or marring of personnel records. This “bypass” around normal Rule G discipline is afforded only one time in a career.

Step Four – Companion Agreement

Once local operating crafts have distributed their policy statements, established the action committee and ratified the bypass agreement, Union Pacific System places in effect the Rule “G” Companion Agreement. This makes it possible for an employee without a previous Rule G violation to return to service during a 12-month probationary period provided that the employee participates in the Employee Assistance Rehabilitation or Education Program, depending upon individual needs.

Step Five – Operation Red Block

Concurrent with Steps One through Four, the BLE- and UTU-sponsored information and awareness program, “Operation Red Block,” described in this brochure will be conducted.

INSURANCE FOR TREATMENT OF ALCOHOLISM

To exhibit its sincere interest in helping employees rehabilitate themselves, the UTU has improved its health

and welfare plan under Group Policy GA-23000 to insure that the cost to employees will be almost negligible.

The plan now covers confinement of an employee and dependents in a treatment center because of alcoholism or chemical dependency.

Other improvements in the Treatment Center Expense Benefits, effective July 1, 1984, are:

The \$2,000 limit for the first confinement increased to \$5,000 plus 80% of the charges over \$5,000 up to 30 days.

Benefits for the second confinement have been increased to \$3,000 plus 80% of the charges over \$3,000 over 30 days.

Coverage added for approved transportation to a Treatment Center for confinement. After satisfaction of \$100 deductible, the plan pays 80% of reasonable charges up to \$500 for each covered confinement.

Coverage added for out-patient treatment in a Treatment Center or licensed out-patient facility. The plan provides for two, 12-month benefit periods in a lifetime with a limit of 30 treatments for each benefit period. After satisfaction of \$100 deductible for each benefit period, the plan pays 80% of covered charges up to \$40 per treatment.

Under coverage provided by GA-23000, the confinement must be based on a written recommendation of the attending physician, a duly qualified alcohol rehabilitation counselor or an alcoholism paraprofessional.

For information about exclusions under the plan, consult the booklet on Group Policy GA-23000.

NORTH AMERICAN RAILROADS WITH EMPLOYEE ASSISTANCE PROGRAMS

Akron, Canton & Youngstown
 Alton & Southern
 Amtrak
 Atchison, Topeka & Santa Fe
 Baltimore & Ohio
 Bessemer & Lake Erie
 British Columbia
 Burlington Northern
 Canadian National
 Canadian Pacific
 Central of Vermont
 Chesapeake & Ohio
 Chicago & Eastern Illinois
 Chicago, Milwaukee, St. Paul & Pacific
 Chicago & Northwestern
 Conrail
 Denver & Rio Grande Western
 Duluth, Missabe & Iron Range
 Elgin, Joliet & Eastern
 Grand Trunk Western
 Green Bay & Western
 Houston Belt & Terminal
 Illinois Central Gulf
 Indiana Harbor Belt
 Lake Terminal
 Long Island
 Louisville & Nashville
 Metro North
 Missouri Pacific
 Newburgh & South Shore
 Norfolk & Western
 Port Terminal Railroad Assn.

St. Louis-San Francisco
 St. Louis Southwestern
 Seaboard Coast Line
 Soo Line
 Southern Railway
 Southern Pacific
 Terminal Railroad Association
 Texas & Pacific
 Union Pacific
 Union Railway
 Western Maryland
 Western Pacific

BUS COMPANIES WITH EAPs

Southern California Rapid Transit District

THE UTU RECOMMENDS:

Starting with the pioneer effort in the early 1950's, the North American rail industry has progressed to more than 40 programs aimed at helping people with alcohol problems. More are being planned.

Thousands of problem drinkers have benefitted, saving their jobs and also helping the industry to curb drinking-related losses estimated at nearly 500 million dollars annually through absenteeism, lost productivity, injuries, damages, grievances and other problems.

Because it costs more to dismiss a problem drinker than it does to rehabilitate him, a company profits from a sound Employee Assistance Program. And the benefit to the rehabilitated employee and his or her family cannot be measured in dollars alone.

If your company has a program already established, learn all you can about it. Find out who is eligible for assistance, where it is provided, and by whom.

Many of the programs more recently developed have had local joint labor-management participation from the start and there are usually labor members on the joint committee which oversees the program. Find out who these members are, and invite them to discuss the program with the members of your local union. If your company does not have an Employee Assistance Program, approach your union representative about starting such a program and ask him to form a committee of concern to talk to management about starting an Employee Assistance Program with labor participation.

UTU Headquarters can furnish you with information about alcoholism and provide samples of such things as policy statements, procedures in the operation of programs, costs, etc. UTU will also provide consultation to any company and its unions who are interested in establishing a program.

STAY INVOLVED

After a program is started—stay involved, help where and when you can by becoming a “resource person” in the program. If you are a recovered alcoholic, you can be especially helpful to the counselor. Remember the program can only help others if you help the program.

Learn as much as you can about the problems of alcohol and drug abuse. Literature on the subject can be obtained locally by contacting Alcoholics Anonymous groups, specialized treatment centers, clinics and hospitals, or local councils, and commissions often supported by United Way Agencies.

Do something with this learning by supporting needed referral and treatment centers in your community.

For more information, contact UTU Headquarters at the following address: **United Transportation Union, 14600 Detroit Ave., Cleveland, Ohio 44107** or an EAP counselor on your railroad or bus company.

PREVENTION AND RULE 'G' DISCIPLINE OPTION

	Prevention Committee	Rule G By-Pass Agreement	Companion Agreement	Rule G
Initial Action	(1) talk with employee (2) request employee mark-off	fellow employee notifies co-officer of unsafe employee	Co-Officer removes employee from service Notify employee by letter of option to see E.A. Counselor	Co-Officer removes employee from service
Investigation	No	No	Yes, unless waived	Yes
Role of Employee Asst. Counselor	None	determines when employee is safe to return to work and provides rehabilitation/education	determines when employee is safe to return to work and provides rehabilitation/education	Works with employee during rehabilitation education
When employee can return to service	Next shift	when E.A. Counselor determines employee is safe to work	when E.A. Counselor determines employee is safe to work	approximately 6 months at a minimum, generally longer
Probation	None	None	12 months	minimum 6 months after returning to service
Effect on personal records	None	Note indicating By-Pass has been used	Shows employee has completed process per agreement	Shows employee received Rule 'G'
Effect on employment	None	None	None	With 2nd Rule 'G' violation permanently dismissed unless reinstated public law board



PLAINTIFF'S EXHIBIT 4

OFFICE OF SUPERINTENDENT
TAMPA DIVISION
TAMPA, FLORIDA

SEABOARD SYSTEM RR CO.

OCTOBER 23, 1985

PERSONNEL: ALCOHOLISM

CIRCULAR 182

ALL CONCERNED:

UNDER FEDERAL RAILROAD ADMINISTRATION (FRA) SAFETY REGULATIONS, RAILROAD EMPLOYEES MAY BE REQUIRED TO PROVIDE A URINE SAMPLE AFTER CERTAIN ACCIDENTS AND INCIDENTS OR AT ANY TIME THE COMPANY REASONABLY SUSPECTS THAT THEY ARE UNDER THE INFLUENCE OF, OR IMPAIRED BY, DRUGS WHILE ON DUTY. BECAUSE OF ITS SENSITIVITY, THE URINE TEST MAY REVEAL WHETHER OR NOT EMPLOYEES HAVE USED CERTAIN DRUGS WITHIN THE RECENT PAST (IN A RARE CASE, UP TO SIXTY DAYS BEFORE THE SAMPLE IS COLLECTED). AS A GENERAL MATTER, THE TEST CANNOT DISTINGUISH BETWEEN RECENT USE OFF THE JOB AND CURRENT IMPAIRMENT. HOWEVER, THE FEDERAL REGULATIONS PROVIDE THAT IF ONLY THE URINE TEST IS AVAILABLE, A POSITIVE FINDING ON THAT TEST WILL SUPPORT A PRESUMPTION THAT THE EMPLOYEE WAS IMPAIRED AT THE TIME THE SAMPLE WAS TAKEN.

EMPLOYEES CAN AVOID THIS PRESUMPTION OF IMPAIRMENT BY DEMANDING TO PROVIDE A BLOOD SAMPLE AT THE SAME TIME THE URINE SAMPLE IS COLLECTED. THE BLOOD TEST WILL PROVIDE INFORMATION PERTINENT TO CURRENT IMPAIRMENT. REGARDLESS OF THE OUTCOME OF THE BLOOD TEST, IF EMPLOYEES PROVIDE A BLOOD SAMPLE THERE WILL BE NO PRESUMPTION OF IMPAIRMENT FROM A POSITIVE URINE TEST.

THE ILLEGAL USE OF A DRUG, NARCOTIC OR OTHER CONTROLLED SUBSTANCE WHILE ON OR OFF DUTY IS PROHIBITED. AN EMPLOYEE WILL BE REMOVED FROM SERVICE IF ANY EVIDENCE OF AN ILLEGAL DRUG, NARCOTIC OR OTHER CONTROLLED SUBSTANCE IS FOUND IN THE URINE, AS INDICATED BY A TEST OF THE URINE, OR IN THE BLOOD, AS INDICATED BY A BLOOD TEST.

IF EMPLOYEES HAVE USED ANY DRUG OFF THE JOB (OTHER THAN A MEDICATION THEY POSSESSED LAWFULLY) IN THE PRIOR SIXTY DAYS, IT MAY BE IN THEIR BEST INTEREST TO PROVIDE A BLOOD SAMPLE. IF EMPLOYEES HAVE NOT MADE UNAUTHORIZED USE OF ANY DRUG IN THE PRIOR SIXTY DAYS, THEY CAN EXPECT THAT THE URINE TEST WILL BE NEGATIVE, AND MAY NOT WISH TO PROVIDE A BLOOD SAMPLE.

EMPLOYEES ARE NOT REQUIRED TO PROVIDE A BLOOD SAMPLE AT ANY TIME EXCEPT IN THE CASE OF CERTAIN ACCIDENTS AND INCIDENTS SUBJECT TO FEDERAL POST-ACCIDENT TESTING REQUIREMENTS (49 CFR PART 219, SUBPART C).

A COMPLETE COPY OF THE FEDERAL REGULATIONS IS AVAILABLE FOR YOUR REVIEW AT THE OFFICE OF YOUR SUPERINTENDENT OR DEPARTMENT HEAD.

LL/L5/85 CC: LAWRENCE MANN, Attorney

PLAINTIFF'S EXHIBIT 3

**SOUTHERN PACIFIC TRANSPORTATION
COMPANY
(WESTERN DIVISION)
018-12**

Oakland, October 29, 1985

SPECIAL NOTICE NO. 5**ALL CONCERNED:**

Following is added to Special Notices and Instructions—All Employees, dated July 1, 1984, VIII, OTHER INSTRUCTIONS GOVERNING PERSONNEL—3.0-, 8:

1. Federal Railroad Administration (FRA) Safety Regulations—Authorized, covering Control of Alcohol and Drug Use in railroad operations become effective November 1, 1985 and apply to employees engaged in Hours of Service occupations (covered service), and requires the following notice:

"Under Federal Railroad Administration (FRA) safety regulations, you may be required to provide a urine sample after certain accidents and incidents or at any time the company reasonably suspects that you are under the influence of, or impaired by, drugs while on duty. Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to *sixty* days before the sample is collected). As a general matter, the rest [sic] cannot distinguish between recent use off the job and current impairment. However, the Federal regulations provide that if only the urine test is available, a positive finding on that test will support a

presumption that you were impaired at the time the sample was taken.

You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. The blood test will provide information pertinent to current impairment. Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.

If you have used any drug off the job (other than a medication that you possessed lawfully) in the prior sixty days, it may be in your interest to provide a blood sample. If you have not made unauthorized use of any drug in the prior sixty days, you can expect that the urine test will be negative; and you may not wish to provide a blood sample.

You are not required to provide a blood sample at any time, except in the case of certain accidents and incidents subject to Federal post-accident testing requirements (49 C.F.R. Part 219, Subpart C).

A complete copy of the Federal regulations is available for your review at 1707 Wood Street, Oakland, CA. 94607.

A railroad that has a policy that forbids off-the-job use of drugs (not involving a specific proof that the employee is under the influence of the substance or impaired by it on the job) must include in such a notice a statement concerning any additional consequences of a positive urine test."

2. NOTICE AND POLICY OF SPTCo. AND SSW

It is the policy of SPTCo. and SSW and has been for a number of years that a violation of Rule "G" will subject

an employee to appropriate disciplinary action. Following is a quote of SPTCo.-SSW Rule "G":

"The use of alcoholic beverages or intoxicants by employees subject to duty, or their possession, use, or being under the influence thereof while on duty or on Company property, is prohibited.

Employees shall not report for duty under the influence of, or use while on duty or on Company property any drug, medication or other substance, including those prescribed by a doctor, that will in any way adversely affect their alertness, coordination, reaction, response or safety. Questionable cases involving prescribed medication shall be referred to a Southern Pacific Medical Officer.

The illegal use, possession or sale while on or off duty of a drug, narcotic or other substance which affects alertness, coordination, reaction, response or safety, is prohibited. (Effective April 30, 1982)."

When toxicological tests, including urine, indicate the illegal use on or off duty of a drug, narcotic or other substance which affects alertness, coordination, reaction, response or safety the employee will be subject to appropriate disciplinary action. At the time a urine sample is collected an employee may request a blood sample be collected.

SPTCo. and SSW will continue its alcohol and drug identification efforts under its obligation to provide a safe place for its employees to work. Additional urine tests may be conducted for just and reasonable cause, reasonable suspicion, accident/incident and certain rule violations that affect the safety of the employee and the safety of the railroad operation.

L. P. Marsh
Superintendent

National Transportation Safety Board
Washington, D.C. 20594

Office of the Chairman

FEB 10 1986

Honorable Edwin Meese III
Attorney General of the United States
Department of Justice
Room 5111
Constitution Avenue and Tenth Street, N.W.
Washington, D.C. 20530

Re: *Railway Labor Executives Association,
et al. v. Elizabeth Dole, Secretary,
Department of Transportation, et al.*
(No. 85-2891 9th Cir.)

Dear Mr. Attorney General:

The purpose of this letter is to express the grave concerns of the National Transportation Safety Board (Board) regarding the above-captioned litigation in that it poses an immediate threat to railroad transportation safety. The Justice Department is currently representing the Federal Railroad Administration (FRA) in that suit which seeks to block an FRA rule requiring, among other things, postaccident toxicological testing of railroad crewmembers. The Board, as an independent agency charged by Congress with the formulation of proposals to improve transportation safety, was a principal catalyst for this rule. We are convinced the rule would have a significant, positive impact on railroad transportation safety. We therefore urge you to vigorously oppose the challenge to this critical rule.

Since its creation in 1966, the Board has served as the lead Federal agency for the investigation of every civil aircraft accident and of major accidents in the other modes of transportation, i.e., railroad, marine, pipeline, and highway. Congress established the Board in 1974 as a completely independent agency because of the recognition that the proper conduct of the responsibilities of the Board "requires vigorous investigation of accidents involving transportation modes regulated by other agencies of Government. . . ." 49 U.S.C. § 1901(2). Congress therefore, charged the Board with the responsibility to "promote transportation safety by conducting independent accident investigations and by formulating safety improvement recommendations." 49 U.S.C. § 1901(1). To ensure that the Board's actions receive widespread attention, the Board is required to determine and publicly report the facts, conditions, circumstances, and probable cause(s) of the accidents it investigates. 49 U.S.C. § 1903(a)(2). The core accident prevention mission of the Board is accomplished through the identification of measures to prevent accidents—safety recommendations designed to preclude accidents and to avoid or at least lessen human injuries. 49 U.S.C. § 1903(a)(3).

The Board has the well-earned reputation as the world's foremost authority on the investigation of transportation accidents, and the methods and investigative techniques we have developed, particularly in aviation, are used as models throughout the world. Since the Board does not regulate any mode of transportation and since its sole mission is the promotion of transportation safety, the Board's only constituency is the public. The Board is free, and feels free, to critically but objectively assess the safety of the transportation network. As the primary Federal agency responsible for the investigation of transportation

mishaps, the Board occupies a unique position for pinpointing shortcomings in a transportation system and for proposing means to combat safety problems. One such chronic problem is the influence of alcohol and drugs on railroad crewmembers, the full dimensions of which are unknown.

The Board has long been concerned about the role of alcohol and drugs in railroad accidents. Recent railroad accidents involving alcohol/drug abuse have heightened its concern. In 18 cases investigated or under investigation by the Safety Board in which alcohol and drug use was involved, 13 railroad employees were killed, 25 employees were injured, and property damage was reportedly in excess of \$25 million. Of paramount concern to the Board is the protection of the public and railroad employees who are placed in life-threatening situations by railroad employees who may be under the influence of alcohol and/or drugs.

An even more looming danger is the risk of release of hazardous materials that today's trains transport daily in thousands of carloads. These hazardous materials are extremely dangerous and some are potentially violent, capable of creating devastating explosions and/or fireballs. Other materials are extremely poisonous, threatening people in the surrounding area of a railroad accident with both immediate and long-term health hazards. A particularly chilling train derailment highlights this threat to the public's safety:

On September 28, 1982, an Illinois Central Gulf Railroad Company (ICG) freight train, No. Extra 9629 East, derailed near Livingston Louisiana.¹ In-

¹ See National Transportation Safety Board (NTSB) Railroad Accident Report, "Derailment of Illinois Central Gulf Railroad Freight Train Extra 9629 East (GS-2-28) and Release of Hazardous Materials at Livingston, Louisiana, September 28, 1982" (NTSB/RAR-83/05).

volved in the derailment were 43 cars, of which 14 were tank cars containing various hazardous materials. The hazardous materials included vinyl chloride, methyl chloride, motor fuel "antiknock" compound (tetraethyl lead), hydrofluosilic acid, metallic sodium, styrene monomer, phosphoric acid, and toluene diisocyanate. In the fire following the accident, two of the tank cars violently rocketed, and smoke and toxic gases were released into the atmosphere. As a result of the accident, approximately 3,000 people who lived within 5 miles of the accident site were evacuated for periods as long as 2 weeks. Several homes were burned and destroyed. Many residents never returned to their homes. Property damages and losses have been estimated in excess of \$14 million. The court settlement has been reported at \$38 million.

During its investigation of this accident, the Board found evidence that the crewmembers had consumed alcoholic beverages before reporting for duty and while on duty even though the railroad had a rule which prohibited such consumption before reporting for duty and while on duty, commonly denoted as Rule G. The engineer and brakeman were seen in a drinking establishment and were observed to have consumed alcohol beverages before and after reporting for work.

Less than a week later, on October 3, 1982, a Missouri Pacific Railroad Company (MP) freight train, No. MP Extra 2437 South, collided with the side of train No. MP Extra 2948 North, which was moving through a switch at Glaise Junction near Possum Grape, Arkansas.² The

² See National Transportation Safety Board Railroad Accident Report – "Side Collision of Two Missouri Pacific Railroad Company Freight Trains at Glaise Junction, Near Possum Grape, Arkansas, October 3, 1982" (NTSB/RAR-83/06).

engineer and head brakeman of train No. MP Extra 2437 South were both killed in the side collision. Property damage was estimated at \$1 million.

The fatally injured engineer of train No. MP Extra 2437 South had a tested blood alcohol level (BAL) of 0.04 percent and other evidence of alcohol in his system. The Board believes that there is considerable research available that indicates performance deterioration at even low levels of alcohol intake. (See enclosures.)

As a result of its investigation of an accident at Indio, California,³ the Safety Board recommended on March 20, 1974, that: "The Federal Railroad Administration include in [its] proposed Standards for Rules Governing the Operation of Trains, regulations that will in effect prohibit the use of narcotics and intoxicants by employees for a specified period prior to their reporting for duty and while they are on duty, (Recommendation R-74-9)." As a result of this recommendation, the FRA revised its accident causal codes and added a specific code to obtain data on the alcohol and drug abuse problem. Additionally, the FRA supported the cooperative labor-management Railroad Employees Assistance Programs (REAP), directed at helping the problem drinker. The Safety Board has commended the FRA for these efforts. However, the Safety Board believes these efforts have only indirectly addressed the primary safety issue—the need for a strong deterrent to the use of alcohol and drugs by railroad operating employees.

³ See National Transportation Safety Board Railroad Accident Report – "Rear-end Collision of Two Southern Pacific Transportation Company Freight Trains, Indio, California, June 25, 1972" (NTSB-RAR-74-1).

A 1979 report prepared for the FRA⁴ examined the drinking practices of 234,000 railroad workers on seven railroads during 1978. Some of the findings of this study were:

- There were an estimated 175,000 drinking rule violations in 1978.
- Twelve percent, or 28,000, of the workers in the study drank alcoholic beverages on an average of 3 days while on duty in 1978.
- Five percent, or 11,000, workers were "very drunk" at least once upon reporting for duty or while on duty. Fifteen percent, or 35,000, workers were a "little drunk" at least once upon reporting for duty or while on duty.
- The highest percentage of problem drinkers is found among the operating craft employees. (Twenty-three percent, or about 16,000, of the 72,000 operating personnel studied are problem drinkers.)
- 7,000 of the 234,000 workers reported seeing an alcohol-related train accident.

One of the most significant conclusions of this study states, "There is evidence that employee drinking is an important contributing factor to railway accident, but the connection between drinking and safety is not being adequately investigated."

Even though the FRA has added a specific accident reporting code to collect data on the alcohol-drug abuse problem, one of the major difficulties in addressing the alcohol/drug abuse problem continues to be inadequate statistics. As stated by the Administrator of the FRA on

⁴ T.A. Manello and F.J. Seaman, "Prevalence, Costs and Handling of Drinking Problems on Seven Railroads," December 1979 (DOT-TSC-1375).

June 24, 1982, "... if you look at the FRA safety reporting code, the document which requires one to indicate whether an accident was drug or alcohol-related, you find the most sober industry on the face of the earth."⁵ The Administrator referred to 1975-1981 FRA accident statistics which show that of 63,900 accidents reported, only 11 accidents were reported to have been related to alcohol-drug abuse. During the same period, there were 741 reported fatalities, of which only 3 fatalities were the result of alcohol-drug abuse, according to FRA statistics. The Administrator in that same speech acknowledged that "... the records are wrong."

Investigation of accidents has been hampered because toxicological tests for alcohol-drug use are not made after serious railroad accidents when the employees responsible for the operation of the train are not fatally injured. Only when crewmembers are killed are such tests generally performed. For example, in the Glaise Junction accident near Possum Grape, Arkansas, which involved fatalities among the crewmembers, toxicological tests were immediately taken, and the facts were clearly documented. However, in the Livingston, Louisiana, accident, toxicological tests were not taken since there was no fatality. The Board believes that railroad safety would be greatly improved if employees knew that toxicological tests would be taken of the surviving employees as well as of those fatally injured in the event of a railroad accident that is required to be reported to the FRA or to the Board involving: (1) a fatality, (2) a passenger train, (3) a significant release of hazardous materials, (4) an injury, or (5) substantial property damage.

⁵ Honorable Robert W. Blanchette, Administrator, FRA, remarks before the 1982 Conference on Innovative Approaches for Dealing with Alcohol and Drug Abuse Problems in the Railroad, June 24, 1982, New Orleans, Louisiana.

The Board is extremely concerned over the senseless and needless death of other innocent railroad employees. Several cases highlight this concern.

On September 14, 1983, Seaboard System Railroad train Extra 1751 North moved onto the main track from the north end of the siding at Sullivan, Indiana, and proceeded north.⁶ After Extra 1741 North had attained a speed of approximately 18 mph, another Seaboard train, Extra 8051 North, moving about 35 mph, overtook and struck the rear caboose of Extra 1751 North. The two crewmembers in the rear caboose were killed, and three crewmembers on Extra 8051 North were injured.

The Board calculates that the Extra 8051 North engineer's BAL at the time of the accident was 0.33 percent. The head brakeman for Extra 8051 North had a BAL of 0.11 percent. The Safety Board determined that the probable cause of this accident was failure of both head-end crewmembers of Extra 8051 North to remain alert due to the use of alcohol on duty, which resulted in their failure to observe the speed restrictions imposed by the governing wayside signals and to control the movement of the train accordingly.

Two catastrophic accidents occurred on the Burlington Northern Railroad in 1984 that further accentuated the Board's concern over railroad employees' safety.⁷ On

⁶ See National Transportation Safety Board Railroad Accident Report—"Rear End Collision of Seaboard System Railroad Freight Trains Extra 8051 North and Extra 1751 North, Sullivan, Indiana, September 14, 1983" (NTSB/RAR-84/02).

⁷ See National Transportation Safety Board Railroad Accident Report—"Head-on Collision of Burlington Northern Railroad Freight Trains Extra 6714 West and Extra 7820 East, Wiggins, Colorado, April 13, 1984, and Read-End [sic] Collision of Burlington Northern Railroad Freight Trains Extra 7843 East and Extra ATSF 8112 East Near Newcastle, Wyoming, April 22, 1984" (NTSB/RAR-85/04).

April 13, 1984, Burlington Northern Railroad Company freight trains Extra 6714 West and Extra 7820 East collided head-on on the single main track at Wiggins, Colorado. Five train crewmembers were killed and two were injured. Total damage was estimated to be \$3.9 million. On April 22, 1984, eastbound Burlington Northern freight train Extra 7843 East struck the rear of Burlington Northern freight train Extra ATSF 8112 East on the main track at Pedro passing siding area near Newcastle, Wyoming. Two train crewmembers were killed, and two were injured. Total estimated property damage was \$1.4 million. The Safety Board found in the Wiggins accident that consumption of alcohol by the head-end crewmember of Extra 0714 West was a contributing factor and in the Newcastle case that the use of marijuana by the engineer of Extra 7843 East was a contributing factor.

Currently, there are no uniform State requirements for toxicological tests in the event of a railroad accident, and, but for the FRA rule being challenged in the captioned litigation, there would be no such Federal requirements. Several States do have statutory or regulatory requirements for toxicological tests in the event of an industrial and/or motor vehicle accident in which there is a fatality. Some States require such tests as a matter of policy established by their State medical examiner's office. In contrast, the Federal Aviation Administration (FAA), a sister organization of the FRA in the Department of Transportation, obtains toxicological results in approximately 85 percent of the aviation accidents involving fatalities. As a matter of fact, the FAA has its own toxicological laboratory and has developed a toxicological kit which includes instructions and shipping procedures. Further, as a matter of practice, the FAA requires toxicological tests of every occupant fatality of a general aviation airplane crash and a full autopsy on each person

seated at the aircraft's controls. This practice has allowed the FAA to develop a fairly complete picture of the alcohol/drug problem in the aviation industry.

In 14 CFR 91.11, the FAA specifically prohibits the use of alcohol and drugs as follows:

- (a) No person may act as a crewmember of a civil aircraft —
 - (1) Within 8 hours after the consumption of any alcohol beverage;
 - (2) While under the influence of alcohol;
 - (3) While using any drug that affects his faculties in any way contrary to safety; or
 - (4) While having .04 percent by weight or more alcohol in the blood.

On March 7, 1983, the Board issued safety recommendations to the FRA to promulgate regulations to effectively assist railroads to deal with the use of alcohol and drugs by all employees who are responsible for the operation and handling of trains. The Board's recommendations to the FRA read as follows:

Immediately promulgate a specific regulation with appropriate penalties prohibiting the use of alcohol and drugs by employees for a specified period before reporting for duty and while on duty. (Safety Recommendation R-83-30)

With the assistance of the Association of American Railroads and the Railway Labor Executives Association develop and promulgate effective procedures to ensure that timely toxicological tests are performed on all employees responsible for the operation of the train after a railroad accident which involves a fatality, a passenger train, release of hazardous materials, an injury, or substantial property damage. (Safety Recommendation R-83-31)

The FRA responded to Safety Recommendations R-83-30 and R-83-31 and on June 5, 1983, issued an Advance Notice of Proposed Rule Making (ANPRM) to address the alcohol and drug problem. The FRA held public hearings at several locations throughout the country. The Board testified at every hearing because of our commitment to public safety to achieve rules which we believe will terminate life-threatening situations caused by railroad employees who may be under the influence of alcohol and/or drugs. Finally, on August 2, 1985 (50 FR 31508), the FRA published the rule requiring toxicological testing of railroad operating crewmembers under certain circumstances.

In conclusion, the Safety Board believes that the knowledge by railroad operating crewmembers that they would be subject to tests in the event of an accident would be a powerful incentive to comply with the existing rules prohibiting alcohol and drug use. Equally as important, the results from such tests will, for the first time ever, provide a reliable data base on the magnitude of the role of alcohol and drugs in the causation of rail accidents. Without such tests, the actual cause of accidents is often extremely difficult to establish and the data base may be suspect. For example, without such tests, accidents which are in fact caused by alcohol or drug abuse may not be identified as such because of the lack of reliable, scientific data. Consequently, the determined cause of such accidents may be unavoidably erroneous and the opportunity for effective remedial measures lost forever.

Public safety should not depend on the fortuitous but haphazard testing that is now done only where the crewmembers are fatally injured. Public safety must rely on systematic testing that will provide meaningful data on the true extent of alcohol and drug abuse by railroad op-

erating crewmembers so that effective and timely action can be taken to halt the widespread use of alcohol and drugs in the railroad operating environment.

The Board has no objection to your making this letter public.

Respectfully yours,

ORIGINAL SIGNED BY
JIM BURNETT

Jim Burnett
Chairman

Enclosures (7)

**BROTHERHOOD
OF LOCOMOTIVE ENGINEERS**

GENERAL COMMITTEE OF ADJUSTMENT
ST. LOUIS SOUTHWESTERN RAILWAY LINES
D.E. THOMPSON, CHAIRMAN
1414 MAIN STREET - CENTER SUITE
SCOTT CITY, MO. 63780

P. M. WILKERSON, SEC'Y TREAS
420 KEELEY AVE.
SCOTT CITY, MO. 63780

March 21, 1986

ICC-243-2

John H. Riley, Administrator
Federal Railroad Administration
400 Seventh Street Southwest
Washington, D.C. 20590

Dear Mr. Riley:

I wish to file a formal protest against the St. Louis Southwestern Railway Company and its carrier officers who forced an engineer and fireman, represented by this Organization, to provide blood and urine samples and the manner in which the samples were obtained for toxicological testing under the Final Rule issued by the Federal Railroad Administration as taken from the August 2, 1985 Federal Register and in violation of Subpart C, Section 219.201 and Section 219.203 as found on pages 31571 and 31572.

I also wish to protest the ambiguous language as found in Section 219.201(c), parts 1, 2 and 3, and all of Sections 219.203 and 219.205 in the above mentioned Final Rule.

On March 11, 1986 Engineer D. R. Green and Fireman D. V. Case were called in pool freight service at Pine Bluff, Arkansas, to operate train HOASM, engine 7780, Pine Bluff to Jonesboro, Arkansas, on duty at 1:45 p.m.

Enroute to Jonesboro, Arkansas, at approximately 8:55 p.m., the train was struck by high winds or a tornado which resulted in 27 cars of the train being derailed. This fact is undisputed.

At approximately 1:25 a.m. Trainmaster-Agent T. E. Stokes from Memphis, Tennessee, and Assistant Division Superintendent Carl Bradley from Pine Bluff, Arkansas, were at the scene of the derailment and forced the entire crew to submit to the test using the Final Rule as their authority.

The tests were not completed until about 3:15 a.m. on March 12, 1986 and the crew was allowed something to eat around 3:25 a.m. Remember, this crew's last meal would have been around 12:30 p.m. on March 11, 1986. Where is the immediate taking of the test or concern for the crew with handling such as this?

The crew was taken to a small hospital at Brinkley, Arkansas, which was not equipped to take the samples as per the rule. The Carrier had knowledge of this and had contacted the company nurse at Little Rock, Arkansas, to have her bring the kit to the hospital at Brinkley.

As the BLE General Chairman representing the engineers and firemen on this property, I had told Mr. Bradley that I was going to file a complaint the next time he forced a crew to take a test without probable cause. This is not the first such violation. I have not kept records and I cannot give an exact number of tests that have been performed on this property without probable cause.

The FRA has suggested that it may be necessary to test 150 to 200 incident [sic] in the industry. The Southern Pacific and Cotton Belt have already tested that many em-

ployees to date. I do not know the results of the Southern Pacific, but I can assure you the percentage of positive tests are considerably less than five percent on this property. Where is the good faith determination or probable cause with these percentages?

The abuse of the testing practices and constant harassment of the employees on this property constitutes flagrant violations of due process and must be challenged. When the FRA writes rules such as this, they leave this door wide open for the flagrant repeated violations, which create nothing but blatant harassment for our members.

If the FRA is going to force these rules on the employees, they must be charged with the responsibility of enforcing the rules. It would appear at this time that they either refuse this responsibility or lack the ability to do so.

When we have an incident caused by an act of God and have the crew handled in this manner, it clearly demonstrates the Carrier's continual harassment and now they have the FRA rules to hide behind.

There is no question as to the results of the tests that were performed in this incident. Regardless of the test results, we declare the samples invalid because of the procedure used in taking the samples, which were in violation of the procedures prescribed under the Final Rule.

We respectfully request a thorough investigation into the incident and the Final Rule to assure that similar incidents will not be repeated in the future.

Respectfully,

/s/ D. E. THOMPSON
D. E. Thompson

cc: J. F. Systma, Pres. — BLE
 P. T. Kerrigan, VP & NLR
 W. C. Rockey, Executive Asst. — FRA
 Larry Mann, Atty., RLEA
 D. M. Mohan, Executive VP — SP
 R. D. Bredenberg, Gen. Man. — SP
 L. G. Simpson, Gen. Man. — SP
 Pat Schroeder, U.S. Rep.
 Peter Rodino, U.S. Rep.
 Bill Emerson, U.S. Rep.

Mr. R.T. Bates, President
 Brotherhood of Railroad Signalmen March 22, 1986
 Box U
 Mount Prospect, Illinois 60056

Dear Sir and Brother:

In light of the recent implementation of the Federal Railroad Administration's rules on drug and alcohol use in the railroad industry I thought Grand Lodge would be interested in learning about how our local members are being affected by these new rules.

In Local 119 on the Burlington Northern Railroad there have been three members working in the Alliance Division, which is the area I represent as Local Chairman, subjected to Rule G testing recently. Two members were tested after the FRA rules became effective February 10 and the third was tested October 8, 1985. The following is a report on these three cases:

CASE 1: On February 13, at about 2:15 p.m., C.A. Shaw, CTC Maintainer at Edgemont, South Dakota, was involved in a minor vehicle accident in the parking area at the Burlington Northern office building in Edgemont. Mr. Shaw's accident report, which I will include with this letter, indicates that it was snowing at the time of the accident and that the company vehicle he was driving slid on some ice before striking a parked vehicle. The vehicle he struck was discovered to have been in a "No Parking" area.

Mr. Shaw went to his office and proceeded to fill out the required paperwork for the acci-

dent and attempted to contact his supervisor by company telephone to advise him of the accident. He was informed that a problem had been reported at a hot bearing detector on his territory and left the office to drive to that location. There he was successful in contacting his supervisor and was instructed to return to the office in Edgemont.

Following a brief review of the incident, Mr. Shaw was transported by BN officials to a hospital in Hot Springs, South Dakota, where he supplied them with urine and blood samples for the company's use in Rule G testing. He was then returned to Edgemont and at about 8 p.m. notified that he was being withheld from service tending results of the Rule G test.

Mr. Shaw was notified at his home at 3 p.m. February 14 by his supervisor that the test results were negative and that he was placed back in service. He was compensated for time spent traveling to the hospital and for time lost while he was withheld from service. There was no formal investigation held in this case. There was no evidence of any action on Mr. Shaw's part which would lead BN officials to invoke the reasonable cause provision of the Rule G guidelines which refer to alcohol or drugs being a contributing factor in an accident. Mr. Shaw has been employed in the Signal Department with BN since May 1976 and has an exemplary personal record during that time.

CASE 2: On February 12, between 8 p.m. and midnight, L.D. Schluterbusch, CTC Maintainer at Northport, Nebraska, allegedly violated two

company rules concerning use of a dual control switch and unauthorized occupancy of tracks while working on a trouble call.

Mr. Schluterbusch was notified by a BN dispatcher at about 8 p.m. that there was an improper track indication on a section of his territory. Mr. Schluterbusch informed the dispatcher that a broken rail was the probable cause of the problem and proceeded to arrange for use of a Hy-rail vehicle since the area involved is not accessible with the vehicle supplied for him by the railroad.

Mr. Schluterbusch borrowed a vehicle from the local track forces and obtained a track permit from the dispatcher to place the vehicle on the tracks. After waiting for a train to complete a switching move, he set the vehicle on the tracks on a crossing just outside the limits of his track permit. He was then told by the dispatcher to give back his permit, set off, and wait while three trains were operated through the section where the track indication had been reported. Mr. Schluterbusch took the vehicle off the tracks after using a switch outside his track permit limits to return to the road crossing.

After waiting until close to midnight for the last train movement Mr. Schluterbusch was contacted by his supervisor and told to return home. He informed his supervisor that he would have been unable to continue working, anyway, because of the Hours of Service requirements.

He returned home and received a telephone call from his supervisor at about 3 a.m. Arrangements were made for them to meet at Mr. Schluterbusch's home and following that meeting Mr. Schluterbusch was transported to the hospital in Bridgeport, Nebraska, where he provided a urine sample for Rule G testing. He was instructed to await his supervisor's instructions before returning to duty and was returned to his home at about 4:30 a.m.

Mr. Schluterbusch was notified at 4 p.m. February 14, that the test results were negative and that he was returned to duty. He was compensated for time spent to obtain the test sample and for time withheld from service.

An investigation of the alleged rules violations was scheduled for February 21 and Mr. Schluterbusch agreed to waive that investigation and was suspended from service for five days. I am including a copy of the investigation notice and record with this letter. Incidentally, the cause of the track indication was found to be a broken rail.

CASE 3: On October 8, 1985, at about 11:40 a.m., D.C. Young, CTC Maintainer at Torrington, Wyoming, was involved in a traffic accident while driving a company vehicle in Torrington. Mr. Young's accident report, included with this letter, indicates that he was approaching a stop sign when his vehicle was struck by a vehicle turning out of a parking spot.

The accident was determined to be the fault of the other driver, who was issued a traffic cita-

tion. Mr. Young was instructed by a supervisor to return to his office following the accident and await further instructions. He waited there until about 3 p.m., when he was taken to the local hospital to supply a urine sample for Rule G testing.

Mr. Young was not removed from service. The test results were negative and no investigation was scheduled.

In each of these cases there was no evidence that our members acted in a manner which would have led Burlington Northern officials to reasonably suspect that use of alcohol or drugs was a contributing factor in the incident.

Such evidence apparently will not be given consideration when BN officials are deciding whether to subject our members to Rule G testing. The only criteria seems to be whether there was an accident, no matter how minor, or any other incident involving any employee.

This management technique seems to me to be the equivalent of an FRA-sanctioned fishing expedition. BN management seems to feel that they have a better chance of having an impressive Rule G enforcement record if they take advantage of the new FRA rules to test employees for every minor incident. I suppose it amounts to working with the odds from Burlington Northern's standpoint, but from the employees' standpoint it amounts to harassment and unfair treatment.

These Rule G tests also can result in a measure of embarrassment for the employees subjected to the tests. In each of the three cases reported here our members reside in small communities and news of such testing is far from privileged information in a small town.

Mr. Young informed me that the local newspaper's report on his accident included the information on his being subjected to the BN Rule G test. Mr. Schluterbusch told me, concerning his trip to the Bridgeport hospital for his Rule G test, "Everybody in town knew it the next day." I doubt, however, that news of the negative results of such tests receives such enthusiastic reaction.

I hope this letter and the accompany documents serve to provide Grand Lodge with some worthwhile information concerning the treatment of our member under the new Rule G.

Fraternally,

/s/ JAMES P. FINN
James P. Finn
Local Chairman, Local 119
Brotherhood of Railroad
Signalmen
220 N. 6th St.
Douglas, Wyoming 82633

cc: V. Van Artsdalen, Vice President
W.A. Class, Jr., General Chairman
R.J. Bolinger, Local President
C.A. Shaw
D.C. Young
L.D. Schluterbusch

MEMBER MUST REPORT ALL ACCIDENTS TO THE LOCAL LODGE AND TO THE GRAND LODGE

1. ON LINE TERRITORY: Report accident immediately by wire to Superintendant with copy to nearest Division Grand Master and Division Grand Master. Also immediately complete this form and send to nearest Division Grand Master with copy to Division Grand Master.

2. OFF LINE TERRITORY: Report accident promptly to Grand Division Grand Master on this form and send a copy to be received by Grand Division Grand Master.

3. Accidents involving members are on which insurance is carried must be promptly reported to insurance carrier as well as reporting to Division Grand Master and Grand Division Grand Master.

4. All reports on company vehicles must first be approved by Division Grand Master.

Date of Accident: Feb 13 1986 AM 2:15 PM Visibility poor

Exact Location of Accident: parking lot of Edgemont depot (northwest corner)

Weather (check one) ☐ Clear ☐ Rain ☐ Cloudy ☒ Snowing ☐ Snowing ☐ Other

Company Vehicle (No. 1)

Driver: CA Shaw Home Address: Edgemont SD Phone: Rel

Occupation: Signal Mtr Age: 34 Dept: Signal Stationed: Edgemont

Driver's License No: 552379-01251 State: SD Date: 1/1/86

Unit No: 1178 Veh Make Model: 1984 Ford Lic No: 17392 State: Ne

Speed: 3 mph Direction: East Lane: right Seatbelts in Use? yes Headlights on? yes

Other Vehicle (No. 2)

Driver: Arnie Gissler Home Address: Male Creek, Neb Phone: Rel

Occupation: Male Creek, Neb

Name & Address of Veh Owner: Arnie Gissler - Male Creek, Neb

Veh Make Model: 1984 SRO Chevy PU Lic No: Ne State: Ne

Speed: 3 mph Direction: East Lane: right Seatbelts in Use? yes Headlights on? yes

Insurance Company: State Farm Policy Number: 1000000000

INDICATE ON THIS DIAGRAM WHAT HAPPENED

Use one of these symbols to sketch the scene of your accident, showing all streets or highways, names or numbers.

1. Number each vehicle and show direction of travel by arrow.

2. Use vehicle to show both before and after accident.

3. Show position of vehicle.

4. Show position of vehicle.

5. Show position and direction of vehicle.

6. Show position of vehicle.

7. Show position of vehicle.

8. Show position of vehicle.

9. Show position of vehicle.

10. Show position of vehicle.

11. Show position of vehicle.

12. Show position of vehicle.

13. Show position of vehicle.

14. Show position of vehicle.

15. Show position of vehicle.

16. Show position of vehicle.

17. Show position of vehicle.

18. Show position of vehicle.

19. Show position of vehicle.

20. Show position of vehicle.

21. Show position of vehicle.

22. Show position of vehicle.

23. Show position of vehicle.

24. Show position of vehicle.

25. Show position of vehicle.

26. Show position of vehicle.

27. Show position of vehicle.

28. Show position of vehicle.

29. Show position of vehicle.

30. Show position of vehicle.

31. Show position of vehicle.

32. Show position of vehicle.

33. Show position of vehicle.

34. Show position of vehicle.

35. Show position of vehicle.

36. Show position of vehicle.

37. Show position of vehicle.

38. Show position of vehicle.

39. Show position of vehicle.

40. Show position of vehicle.

41. Show position of vehicle.

42. Show position of vehicle.

43. Show position of vehicle.

44. Show position of vehicle.

45. Show position of vehicle.

46. Show position of vehicle.

47. Show position of vehicle.

48. Show position of vehicle.

49. Show position of vehicle.

50. Show position of vehicle.

51. Show position of vehicle.

52. Show position of vehicle.

53. Show position of vehicle.

54. Show position of vehicle.

55. Show position of vehicle.

56. Show position of vehicle.

57. Show position of vehicle.

58. Show position of vehicle.

59. Show position of vehicle.

60. Show position of vehicle.

61. Show position of vehicle.

62. Show position of vehicle.

63. Show position of vehicle.

64. Show position of vehicle.

65. Show position of vehicle.

66. Show position of vehicle.

67. Show position of vehicle.

68. Show position of vehicle.

69. Show position of vehicle.

70. Show position of vehicle.

71. Show position of vehicle.

72. Show position of vehicle.

73. Show position of vehicle.

74. Show position of vehicle.

75. Show position of vehicle.

76. Show position of vehicle.

77. Show position of vehicle.

78. Show position of vehicle.

79. Show position of vehicle.

80. Show position of vehicle.

81. Show position of vehicle.

82. Show position of vehicle.

83. Show position of vehicle.

84. Show position of vehicle.

85. Show position of vehicle.

86. Show position of vehicle.

87. Show position of vehicle.

88. Show position of vehicle.

89. Show position of vehicle.

90. Show position of vehicle.

91. Show position of vehicle.

92. Show position of vehicle.

93. Show position of vehicle.

94. Show position of vehicle.

95. Show position of vehicle.

96. Show position of vehicle.

97. Show position of vehicle.

98. Show position of vehicle.

99. Show position of vehicle.

100. Show position of vehicle.

Company Driver's Description of Accident (Refer to Vehicles by Number): Vehicle #1 was in parking lot - touched brakes to slow vehicle - it continued on into parking lot and hit on side striking vehicle #2

PRESIDENT

MADE 1986 RTB

OF R. S.

Highway	No. of Lanes	City or Town	County	State
Div.	City	State	County	Route
Traffic Signals at Scene	For Company Vehicle	For Other Vehicle		
Signals Given	By Company Vehicle	By Other Vehicle		
Did Police Make Report of this Accident?				
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If yes, indicate which) <input type="checkbox"/> City Police <input type="checkbox"/> State Police <input type="checkbox"/> Other (Specify)				
Officer's Name		Address		
Describe damage to Company Vehicle <u>front fender bumper</u>				
Estimate of damage \$ <u>150.00</u>				
Describe damage to Other Vehicle <u>dent in tail gate</u>				
Estimate of damage \$ <u>20.00</u>				
Describe any damage to Other Property				
Name and address of owner of other property				
Estimate of damage \$				
VEHICLE INFORMATION				
	NAME	ADDRESS	AGE	SEX
Driver Vehicle 1				
Driver Vehicle 2				
Passenger's Vehicle 1				
Passenger's Vehicle 2				
Others				
WITNESSES				
NAME	ADDRESS	PHONE	RELATIONSHIP	STATE
SIGNATURE <u>[Signature]</u>				

Edgemont, So. Dakota
(Location)

Feb. 13, 1986
(Date)

Carl A. Shaw (Name)

Signal Maintainer (Position)

Edgemont, So. Dakota (Location)

This is to advise you that you are being withheld from service pending results of the investigation of your alleged violation of Rule G on or about 2:15 p.m. Feb. 13, 1986 (Time and Date)

at Edgemont, So. Dakota following probable cause testing procedures.

Please acknowledge receipt by affixing your signature to the space provided on copy of this letter.

Bruce A. Swain [Signature] 7:55 PM
(Name)

Trainmaster (Title)

ACKNOWLEDGEMENT
[Signature]
Signature

2-13-86
Date

Feb. 13, 1986
Date

TO: D.R. Hestermann, A.S.R.M. February 18, 1986

This will acknowledge receipt of your letter dated February 13, 1986 giving notice to attend investigation in the Roadmaster's Office at Bridgeport, Nebraska at 9:00 am, Friday, February 21, 1986 for the purpose of ascertaining the facts and determining responsibility in connection with L.D. Schluterbusch's failure to obtain authority to occupy main track between Power Switch Northport and Power switch East Bridgeport and your failure to obtain authority to use dual control switch machine located at UP transfer Northport at or about 9:45 pm on Wednesday, February 12, 1986 while assigned as Signal Maintainer at Northport East.

This is to advise that I L.D. Schluterbusch, failed to obtain authority to occupy maintrack between Power Switch Northport and Power switch East Bridgeport and to use dual control switch machine located at UP transfer Northport, which is in violation of Rules 46 and 275 of the *Rules of the Maintenance of Way Department* (form 15125).

In connection with this occurrence, I admit I violated Rules 46 and 275 of the *Rules of the Maintenance of Way Department*. Since I admit this offense, I am waiving my right to investigation as per rule 54 of the Agreement between Burlington Northern Inc., and it's [sic] Employees represented by the Brotherhood of Railroad Signalmen with the understanding that discipline will be an entry of censure on my personal record and suspension from the service of the Burlington Northern Railroad Company for a period of 5 (five) days from February 19, 1986 through and including February 23, 1986. Will report for duty February 24, 1986.

LESLIE D. SCHLUTERBUSCH

Signature, Employee

2-18-86

Date

J. P. FRINN

Signature, Union Representative

2-18-86

Date

cc: D.D. Phillips
C.J. McCormick

EXHIBIT 1

BURLINGTON NORTHERN
RAILROAD CO.
SEATTLE REGION

SPOKANE, PACIFIC AND PORTLAND DIVISIONS

TIMETABLE NO. 7

IN EFFECT AT 12:01 A.M.
Pacific Standard Time
Mountain Standard Time

Sunday, April 27, 1986
Including National Railroad Passenger Corporation
(NRPC) Trains

Vice President
W. W. FRANCIS

General Manager
L. D. REED

Vice President
Transportation—System
J. R. GALASSI

SPOKANE DIVISION

J. W. ISENBERG—
Division Superintendent, Spokane

D. L. MAZE—Asst. Supt. Transportation—Spokane
C. E. BROOKS—Asst. Supt. Administration—Spokane
?. F. KNUTSON—Asst. Supt. Roadway Maintenance—
Spokane
?. J. MOLITOR—General Road Foreman—Spokane
?. S. MALING—Trainmaster—Spokane
D. R. WILKERSON—Trainmaster—Spokane
F. C. BROSE—Trainmaster-Road Foreman—Wehatchee
D. G. VERITY—Agent-Asst. Trainmaster—Wehatchee
Agent-Asst. Trainmaster—Kettle Falls
?. D. ALLEN—Trainmaster-Road Foreman—Whitelish
?. J. KURZ—Trainmaster—Whitelish
J. B. SCHARFF—Terminal Superintendent—Spokane
G. L. PORTSCHE—Asst. Terminal Superintendent—
Spokane
J. A. REGAN—Trainmaster-Road Foreman—Spokane
?. D. McLAUGHLIN—Terminal Trainmaster—Spokane
?. ORTIZ—Terminal Trainmaster—Spokane
?. A. CARLSON—Terminal Trainmaster—Spokane
D. E. KULT—Asst. Terminal Trainmaster—Spokane

PACIFIC DIVISION

J. K. VADEN—Division Superintendent, Seattle
R. R. STIMART—Asst. Supt. Transportation—Seattle
H. A. HANSON—Asst. Supt. Administration—Seattle
?. A. PARKER—Asst. Supt. Roadway Maintenance—
Seattle
?. L. NESWICK—General Road Foreman—Seattle
?. A. GORDON—Trainmaster—Road Foreman—Seattle
L. G. HALL—Trainmaster—Longview
B. L. JOHNSON—Agent-Asst. Trainmaster—Longview
M. W. MELINE—Agent-Asst. Trainmaster—Centrawa

D. G. BOESPFLUG – Agent-Asst. Trainmaster – Everett
 ? D. CLIFTON – Trainmaster – Bellingham
 ? B. MORRISON – Agent-Asst. Trainmaster – Bellingham
 ? C. McNEIL – Trainmaster-Road Foreman – Wenatchee
 D. J. KAYNE – Asst. Supt. – New Westminster
 A. J. SCHUURMANS – Agent-Asst. Trainmaster – New Westminster
 ? W. DUFFY – Terminal Superintendent – Seattle
 ? K. LEE – Asst. Terminal Supt. – Seattle
 ? K. SIMONIS – Asst. Terminal Supt. – Tacoma
 ? B. WICK – Terminal Trainmaster – Seattle
 J. K. WOVCHA – Terminal Trainmaster – Seattle
 J. S. LUNAK – Terminal Trainmaster – Seattle
 J. S. MEYER – Terminal Trainmaster – Seattle
 ? J. RUTT – Terminal Trainmaster – Seattle
 ? A. FRY – Terminal Trainmaster – Seattle
 ? W. KING – Trainmaster – Tacoma
 R. L. FUDGE – Asst. Trainmaster – Tacoma

PORTLAND DIVISION

R. J. SEELEY – Division Superintendent, Portland
 K. D. TOWNSEND – Asst. Supt. Transportation – Portland
 W. E. THOMPSON – Asst. Supt. Administration – Portland
 S. G. MELONAS – Asst. Supt. Roadway Maintenance – Portland
 ? ? ALBINGER – General Road Foreman – Portland
 ? H. MITCHELL – Trainmaster-Road Foreman – Vancouver
 ? ? RYAN – Trainmaster-Agent – Klamath Falls
 G. E. WEEKLEY – Trainmaster – Wishram
 J. D. WRIGHT – Trainmaster-Road Foreman – Bend

D. L. MEYERS – Trainmaster-Road Foreman – Portland
 I. B. CLOTT – Agent-Asst. Trainmaster – Albany
 I. G. ANDERSON – Terminal Superintendent – Vancouver
 D. J. MAHLE – Asst. Terminal Supt. – Vancouver
 D. L. MEAD – Terminal Trainmaster – Vancouver
 G. W. BOWMAN – Terminal Trainmaster – Vancouver
 I. E. STEPHENS – Terminal Trainmaster – Vancouver
 I. P. OLSON – Terminal Trainmaster – Vancouver
 I. C. ALBRIGHT – Asst. Terminal Trainmaster – Vancouver
 D. H. SHAFER – Terminal Superintendent – Pasco
 J. A. McKAY – Asst. Terminal Supt. – Pasco
 Terminal Trainmaster – Pasco
 I. R. KOELLNER – Terminal Trainmaster – Pasco
 I. J. BOEN – Terminal Trainmaster – Pasco
 I. J. ROYAL – Terminal Trainmaster – Pasco
 S. M. STOA – Asst. Terminal Trainmaster – Pasco
 D. L. LAMBERSON – Trainmaster – Pasco
 G. L. SOLEM – Trainmaster-Road Foreman – Pasco
 ? N. ROWLEY – Trainmaster – Pasco
 ? N. VOORHEES – Agent-Asst. Trainmaster – Yakima

TRANSPORTATION DEPARTMENT

A. BUTLER – Superintendent Transportation, Seattle
 I. L. JOHNSON – Manager Train Operations – Seattle
 G. L. SKILLMAN – Regional Chief Dispatcher – Seattle
 J. W. MILLER – Chief Dispatcher – Seattle
 L. A. SHORT – Chief Dispatcher – Seattle
 F. G. PORTSMOUTH – Chief Dispatcher – Seattle
 ? E. SHULTZ – Regional Chief Dispatcher – Billings

SPECIAL INSTRUCTIONS

Rule G—change to read:

Employees [sic] must not report for duty; perform service, or enter Company property with a blood alcohol content greater than 0.00 percent and are prohibited from the use, possession or sale of alcoholic beverages while on duty or on Company property.

Employees [sic] must not report for duty, perform service, or enter Company property under the influence of illegal controlled substances and are prohibited from their use, possession or sale while on duty or on Company property. For purposes of this rule, any employee [sic] testing positive for a controlled substance (or its metabolite) in their urine is presumed to be under the influence of such drugs.

Employees [sic] must not report for duty or perform service under the influence or impaired by prescription drugs, medications or other substances that may in any way adversely affect their alertness, coordination, reaction, response or safety.

Employees [sic] operating Company vehicles at any time are subject to this rule.

Rule Q—Add the following:

MT—Main Track(s)

Rules 2 and 3—

Employees [sic] governed by the General Code of Operating Rules are “designated employees” under Rules 2 and 3.

Rule 2—

A reliable watch that indicates hours, minutes and seconds will comply with the requirement of Rule 2. Hours and minutes must be indicated in arabic numerals.

Watches must be cleaned and oiled in accordance with manufacturer's instructions. Battery powered watches must have energy cell (battery) replaced at minimum intervals recommended by manufacturer, or sooner if necessary for accuracy.

Rule 3—

Time signals received from WWV Time may be used to set watches and clocks to correct time. The hours are given in Coordinated Universal Time; therefore, only the minutes and seconds may be used. Telephone number for WWV time is 8-998-8463 (8-WWV Time).

Rule 6(A)—explanation of characters:

- A — Automatic Interlocking (actuated automatically by the approach of a train).
- B — General orders, notices, and circulars.
- I — Manual Interlocking (operated by a control operator).
- J — Junction.
- K — Standard clock.
- M — Railroad crossing protected by signals or gates.
- R — Train register.
- T — Turntable or wye.
- U — Railroad crossing not protected by signals or gates.
- X — Crossover.
- X(2) — Multiple crossovers.
- Y — Yard Limits.

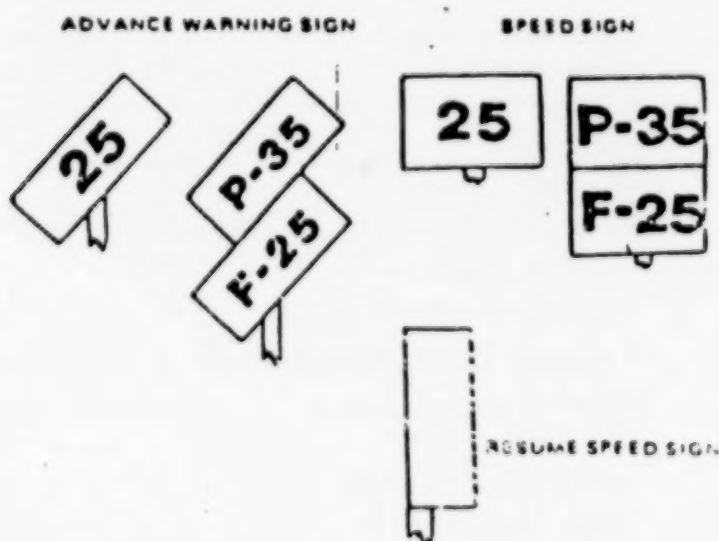
Rule 10(E) — add the following paragraphs:

Reduce speed limits are designated by Advance Warning Sign (diagonally upward), Reduce Speed Sign (square) and Resume Speed Sign (vertical).

The "Advance Warning Sign" will be placed two miles in advance of the location where the lower speed takes effect. At the point where the reduced speed applies, a speed sign will repeat the permissible speed. The lower speed will be in effect until a "Resume Speed Sign" or another "Speed Sign" is displayed.

At the end of a reduced speed zone, a train or engine will be governed by a "Speed Sign" displaying a higher speed or a "Resume Speed Sign" which will authorize the maximum permissible speed on that subdivision. In either case, the speed must not be increased until the entire train has passed the sign displayed.

Locations where reduced speeds are required, but which are not indicated by signs, are listed in the special instructions for each subdivision.



These signs, as illustrated, apply to train and engine movements as follows:

Figures preceded by letter P apply to passenger trains.
Figures preceded by letter F apply to freight trains.
Figures not preceded by a letter apply to all train movements.

Rule 81 —

Within yard limits, switch crew may ascertain from the yardmaster instead of the train dispatcher that there are no train orders or track bulletins that they must obtain. This will fulfill the requirement of Rule 81.

Rule 82(A) — add as last paragraph:

At intermediate locations in CTC territory, Rule 82(A) will not apply when so authorized by train dispatcher.

Rule 93 — add the following two paragraphs:

Conditional yard limits may be established for the hours and/or days specified in general order or special instructions and the limits will be identified by signs reading "CONDITIONAL YARD LIMITS".

General order or special instructions will read, as example:
Conditional yard limits in effect between MP ____ and MP ____ between (station) and (station) (time) until (time) daily Monday through Friday. If in effect 24 hours per day, time need not be specified.

Rule 103(E) — change to read:

Maximum authorized speed is 25 MPH instead of 40 MPH.

Rule 104(M) – change first paragraph to read:

Instructions for operation of spring switches are posted at or near the spring switch and must be complied with. Spring switches are identified by yellow sign with black letter "S" located on or near spring switch. Facing point movements over spring switches will be protected by signals or indicators where required.

Rule 104(M) – change fifth paragraph first sentence to read:

All spring switches are equipped with facing point locks except when identified as not having a facing point lock in the Individual Subdivision Special Instructions.

Rule 153 – add the following paragraph:

When using main tracks, except double track, in westward or southward timetable direction, they will be numbered consecutively from right to left beginning with Main 1. When using in eastward or northward timetable direction, they will be numbered from left to right beginning with Main 1.

Rule 223, Rule 225 and Form N Train Order – Will not be used.

U.S. Department
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

**Federal Railroad
Administration**

May 21 1986

Mr. D. E. Thompson
Chairman
General Committee of Adjustment
St. Louis Southwestern Railway Lines
Brotherhood of Locomotive Engineers
1414 Main Street, Center Suite
Scott City, Missouri 63780

Dear Mr. Thompson:

I appreciate your recent letter regarding post-accident toxicological tests conducted after a derailment of a St. Louis Southwestern Railway (Cotton Belt) train near Penrose, Arkansas, on March 11, 1986. You have expressed concern that this event may not have qualified for post-accident testing under the FRA Alcohol and Drug rule, and have raised other issues related to the FRA rule and the Cotton Belt program.

In response to your telephone call to our Office of Chief Counsel, FRA initiated an investigation of this matter just prior to the receipt of samples at the Civil Aeromedical Institute. We provided a telephonic report to you shortly thereafter. Based on information available at that time, it appeared that there may have been an irregularity in the conduct of the tests. Since that time we have developed additional facts, which, although corroborative in many respects of the information that you provided, describe a different situation from that perceived immediately after the event.

Based on all the information now available, it appears that with one exception the Cotton Belt discharged its obligations under the requirements for mandatory post-accident testing contained in Subpart D, Title 49, Code of Federal Regulations (copy enclosed). The railroad is required to obtain samples for toxicological testing from all crew members after any train accident that is determined to involve at least \$500,000 in railroad property damage. As soon as possible after the accident, the railroad is required to make reasonable inquiry into the facts of the accident and to make a good faith judgment as to whether testing is required. It appears that the Cotton Belt did so.

As you suggested when our Office of Chief Counsel contacted you on March 12, 1986, the railroad did have qualified officers on the scene of the derailment after it occurred. An Assistant Superintendent and Assistant Division Engineer surveyed the damage and reported specific information on railroad property losses to the Superintendent by telephone. In joint consultation, they estimated that damages would exceed \$500,000. Under those circumstances, the railroad was required to take the employees to an independent medical facility for collection of blood and urine samples, which it did.

On the morning after the accident, and subsequent to the taking of samples, damage was estimated at slightly under \$500,000. Over a period of days after the accident, the railroad's officers made a more detailed examination of railroad property damage and perfected an aggregate estimate that slightly exceeds \$500,000. But even if the final damage calculation had fallen under \$500,000, the railroad was correct in testing, since it is the initial good faith judgment that controls. See section 219.201(c).

From all that appears at present, the accident was, as you maintain, caused by a tornado or high winds striking the train. I can certainly understand your concern over

testing crew members after a derailment caused by an act of God. However, the process of regulating requires that lines be drawn that will address legitimate public and private interests in the substantial majority of situations to which they apply. In this case, we had an event that falls far outside those reasonably foreseeable events of ordinary railroad operations. Indeed, we cannot recall any previous accident involving such severe damage caused by an event of this kind.

However, I hope you will keep two points in mind. First, it is nearly always difficult to determine accurately and quickly what caused, or contributed to the severity of, a major train accident. This is especially true where, as here, property damage is substantial; clues as to cause are often hidden in the wreckage. (In this case, it was not immediately clear even to the crew of the train that the derailment had been caused by a tornado.) Only later, after thorough investigation of all of the facts, can final conclusions be reached. Yet, if toxicological samples are to be of any value, they must be obtained as soon as possible after the event. Accordingly, the categorical approach necessary to ensure uniform testing after accidents involving major public interest will, on very rare occasions, produce anomalous cases.

Creating exceptions to post-accident testing for acts of God or other extraordinary occurrences would, I believe, lead to less reliable data on alcohol and drug involvement than our current rule is likely to produce. For example, creating a "tornado" exception might invite allegations of tornado damage where none exists. The tornado might be "invented" in order to evade toxicological testing and/or tort liability; the fact that many tornado sightings go unconfirmed demonstrates that even such a fabrication could not be readily revealed. Even in the case of a derailment of a portion of a train caused by a tornado, proper obser-

vation of weather conditions and coordination of train and locomotive brakes may in some cases prevent a larger and more costly derailment. Absence of toxicological testing may leave unanswered one key question about the fitness of the crewmembers. Similarly, in the case of a track washout caused by a sudden flood, there may often be an opportunity for the crew substantially to mitigate the effects of the natural occurrence that gives rise to the hazard. But a blanket exception for such events would deny the public any information on what may have caused the crew to fail to take such mitigating action. Although it was expected that a very few "acts of God" would play a role in events requiring post-accident testing, commenters in the rulemaking did not seriously argue that a blanket exclusion was practical.

Second, keep in mind that every time we make an exception, we introduce an additional element of judgment, together with the potential exercise of discretion by the railroad officer in the field. It is important that we limit the degree of that discretion as much as we can. Particularly where post-accident testing of blood is concerned, FRA should make sure that the railroads do what the rule requires — no less and no more.

We do not agree with your characterization of sections 219.201, 219.203, and 219.205 as ambiguous. These provisions were prepared after a painstaking rulemaking process. They provide firm guidance to the railroads with respect to the conditions under which tests are to be required. We may well need to address specific problem areas as the rules are implemented and to that end we encourage everyone in the industry to identify any particular provisions that require clarification or modification, offering alternative language that is consistent with the public's interest in determining cause.

There is one significant respect in which the railroad's handling of this incident was deficient. As noted by the crew members involved, the railroad nurse who brought the shipping kit to the hospital apparently became excessively involved in the sample labeling and packaging process. Under the rule, these functions are to be performed by personnel of the independent medical facility. Although it appears that this involvement was intended to facilitate the sample collection process, it was clearly inappropriate. We have brought this matter to the attention of the railroad in order that in the future railroad-employed personnel will not be involved in the process of sample collection.

FRA cannot comment on other testing of your members by the railroad, which you allege to be extensive. It is likely that the FRA requirements for post-accident toxicological testing will require testing after no more than 200 events in any year across the nation. (The pace at which post-accident testing was performed during the first month that the rule was in effect fully supports this prediction.) Wholly apart from the post-accident testing program (Subpart C of the rule) and reasonable cause testing authority (Subpart D of the rule), the Cotton Belt has evidently elected to proceed with urine testing based upon its own authority as an employer. FRA has not authorized this testing and is not responsible for the conditions under which individual tests are performed. If there is a dispute concerning the right of the railroad to conduct these tests, it is a matter for resolution under appropriate provisions of the Railway Labor Act.

Finally, you suggest that the testing that occurred after the Penrose accident was legally deficient because it was not based on "probable cause." That challenge, however, goes directly to the central issue of the pending lawsuit

concerning FRA's rule. Because a qualifying event that triggered mandatory testing had occurred, the railroad had a duty under FRA's rule, which remains in effect, to ensure that the testing was done. Whether such testing is reasonable under the Fourth Amendment will be answered authoritatively by the present court action.

I understand your concerns, and hope that I have addressed them. Thank you for your interest in this matter.

Sincerely,

/s/ JOSEPH W. WALSH

Joseph W. Walsh
Associate Administrator
for Safety

U.S. Department
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

**Federal Railroad
Administration**

May 22 1986

Mr. R. T. Bates
President
Brotherhood of Railroad Signalmen
Box U
Mount Prospect, Illinois 60056

Dear Mr. Bates:

I appreciate your recent letter regarding alleged abuse of the testing provisions of FRA's Alcohol and Drug Regulations by the Burlington Northern Railroad ("BN"). You enclosed a March 22, 1986, letter from James P. Finn, the Brotherhood of Railroad Signalmen local chairman from Douglas, Wyoming, which described three incidents that you believe amount to harassment of employees through BN's application of FRA's rule.

As FRA Administrator John Riley indicated in a previous conversation to which you refer, FRA does not intend to permit its alcohol and drug rule to be used to harass employees. However, FRA's rule had no bearing on the incidents described in Mr. Finn's letter. Each of the testing incidents he describes was performed under BN's own testing program, which was established approximately two years before the FRA rule became effective.

A number of factors indicate that FRA's rule was not relied on and is therefore not at issue. Mr. Finn's factual recitation contains no allegation of any expression or indication by the BN officials that they were relying on testing authority conveyed by FRA's rule. This is not surprising, as BN has apparently decided not to avail itself of

the testing authority granted by Subpart D of FRA's rule; instead, it is continuing to employ its pre-existing authority. Indeed, BN officials have told my staff directly that the testing in question was performed solely on the basis of the railroad's own authority. These representations are consistent with BN's "Supervisor's Handbook of FRA Regulations, BN Policy and Procedures Concerning the Control of Drug and Alcohol Use in Railroad Operations" (dated March 1, 1986), which provides in relevant part (p 60):

Burlington Northern will continue its own program of reasonable cause testing which resembles but is not, at this time, being done under the auspices of the FRA rules. Urinalysis testing will be done when a supervisor has reasonable cause to believe that alcohol or drugs may have been a contributing factor in a human factor accident, or if a Burlington Northern supervisor detects any employee displaying abnormal behavior.

Even assuming *arguendo* that BN purported to rely on the authority granted by Subpart D of our rule, it is clear that none of the three incidents would in fact have qualified under the conditions established by Subpart D. One incident occurred on October 8, 1985, over four months prior to the effective date of FRA's rule, and obviously could not have been authorized thereby.

The February 13, 1986, incident allegedly arose from a minor non-train incident involving a company vehicle and fails to qualify under Subpart D in several respects. First, there is no reason to believe that the employee driving the vehicle was engaged in covered service, e.g., driving to repair a signal mechanism. Nor is there any hint that the railroad was relying on either a supervisor's reasonable suspicion or a rule violation as set forth in Title 49 C.F.R. § 219.301(c)(1) and (c)(2). The only criterion remaining

is that permitting breath or urine* testing of employees reasonably suspected of contributing to the occurrence or severity of a reportable accident or incident. Title 49 C.F.R. § 219.301(b)(2) and (c)(1). But this was not a train accident. Nor was there any injury, much less one that would have made this non-train incident reportable. Absent any circumstances here that would have permitted testing under the authority granted by FRA's rule, the railroad necessarily is relegated to its own authority.

The same is true of the incident occurring on February 12, 1986. Again, no event had occurred that would have authorized testing under FRA's rule. There is first of all no basis for concluding either that two supervisors purported to have a reasonable suspicion of impairment or that the employee tested had been involved in a reportable accident or incident. That leaves only § 219.301(b)(3), which authorizes testing of an employee who has been directly involved in "[n]oncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to the movement of a train. . . ." However, the direction admittedly violated by the tested employee did not go to the movement of a train, but rather concerned the movement of a "hy-rail" vehicle, which is a truck-like vehicle that is also mobile on rails. The employee's actions here, however questionable, were not among the limited safety violations that can trigger authorized testing under the provision in question.

Thus, the incidents related in Mr. Finn's letter were not, and could not have been, related to FRA's rule. I therefore

* Mr. Finn alleges that urine and blood samples were taken. Except for post-accident testing, which is clearly not involved here, FRA's rule permits blood testing only at the request of an employee who has given breath or urine samples based on FRA's reasonable cause provisions.

reject any conclusion that they stand as examples of "an FRA-sanctioned fishing expedition." Whether and to what extent the incidents constituted harassment by BN management of the tested employees are issues that do not involve FRA or our rule, but instead must be resolved under the grievance procedures of the Railway Labor Act.

This response to your letter serves to highlight an important distinction, namely between alcohol and drug testing performed under a railroad's own authority and such testing as is performed under the authority provided by FRA's rule. Your letter blurs this distinction because incidents of *independently* authorized testing are nevertheless raised in support of your legal challenge to testing authorized by FRA's rule. I reiterate that any charges of harassment that arise or appear to have arisen under the claimed authority of FRA's testing rule will trigger a prompt and thorough investigation by this agency.

Let me note in conclusion that reasonable cause testing performed under the authority of Subpart D is apparently going quite smoothly. Moreover, we have received information that several such tests have yielded positive results (one of which turned up a blood alcohol concentration of .16 percent in a signalman). I sincerely believe that this testing serves the uniform desire in the industry: employees impaired by alcohol or drugs should not be permitted to participate in railroad operations.

Thank you for your interest in this matter.

Sincerely,

/s/ JOSEPH W. WALSH

Joseph W. Walsh
Associate Administrator
for Safety

**U.S. Department of
Transportation**

News:

Office of the Assistant Secretary for Public Affairs
Washington, D.C. 20590

FOR RELEASE FRIDAY
October 10, 1986

DOT 94-86

Contact: Hal Paris
Tel. No. (202) 366-9550
Contact: Jennifer Hillings
Tel. No. (202) 366-4570

**DOLE HAILS LA POLICE PROCEDURE
TO DETECT DRUGGED DRIVERS**

Secretary of Transportation Elizabeth Hanford Dole today hailed a potential breakthrough in the detection and prosecution of drug-impaired drivers.

In a drug detection program developed by the Los Angeles Police Department (L.A.P.D.) within the last year, officers who have been specially trained in drug recognition examined and rated suspects brought to the police station. The program has been credited with the successful prosecution of California drivers charged with driving under the influence of drugs.

"The Los Angeles Police Department's program is an important first step in overcoming the obstacles that have hindered the ability of the police to detect, arrest and obtain convictions for drugged drivers," Dole said.

Dole added that trained police officers are able to identify many drivers who have taken moderate to large doses of drugs, as well as identify the drug involved with an extremely high degree of accuracy.

DOT's National Highway Traffic Safety Administration (NHTSA) and the National Institute on Drug Abuse (NIDA) jointly sponsored a laboratory evaluation of the

L.A.P.D.'s drug detection procedures. During the study, conducted at Johns Hopkins University, specific drugs or placebos were administered in varying dosages to volunteers who were then rated independently by each of four L.A.P.D. drug recognition experts.

The results showed that the L.A.P.D. officers were over 98 percent accurate when they identified a subject as having taken a drug. In 92 percent of these cases, the officers correctly identified the class of drug administered.

A followup field evaluation confirmed the laboratory findings and showed the effectiveness of L.A.P.D. procedures in accurately recognizing drug use by drivers.

Police across the country widely use breath-testing devices to confirm that a driver is under the influence of alcohol, but no such device currently exists for detecting the use of other drugs.

In the L.A.P.D. drug detection procedure, a number of components are involved, including an interview concerning the suspect's medical and drug use history; and evaluation of the suspect's alertness and responsiveness; a measurement of certain physiological symptoms, including pulse rate, blood pressure, oral temperature, pupil size and skin signs of substance abuse; and a battery of behavioral tests similar to those used by police to test for alcohol impairment.

Summary reports of both laboratory and field evaluations are available in the form of research notes. Requests for the research notes should be addressed to the Office of Driver and Pedestrian Research, NRD-42, NHTSA, Washington, D.C. 20590. A self-addressed mailing label should accompany the request.

* * *

Research Notes

U.S. Department
of Transportation
National Highway
Traffic Safety
Administration

Laboratory Evaluation of the Los Angeles Police Department's Drugged Driver Detection Procedures

Theodore E. Anderson

The Los Angeles Police Department (LAPD) has developed a rating procedure for use in detecting drug-impaired drivers. Suspect drivers are rated at the stationhouse by officers who have (1) experienced extensive training in the application of this procedure, and (2) been formally qualified as a Drug Recognition Expert (DRE). The purpose of the rating procedure is to determine whether the driver is impaired and to identify the responsible drug class (e.g., stimulant, depressant, etc.). This information then becomes a major part of the prosecuting attorney's case against the driver for violation of the Driving Under the Influence of Drugs statute. It is therefore imperative that the validity of the rating procedure not be subject to question.

As part of a research effort designed to provide data regarding the validity of the LAPD Drugged Driver Detection program, a laboratory evaluation, sponsored jointly by NHTSA and the National Institute on Drug Abuse (NIDA), was recently completed by the Johns Hopkins University. The experimental procedure involved the administration of a specific drug dose conditions to volunteer subjects who were then rated independently by

each of four LAPD Drug Recognition Experts. The drugs administered were:

- Marihuana (2 dose levels)
- Depressants
 - Valium (2 dose levels)
 - Secobarbital (1 dose level)
- Stimulants
 - d-Amphetamine (2 dose levels)

The LAPD raters were instructed to indicate estimated drug classes even if they were not as confident as they would normally be in a field situation. For purposes of this experimental evaluation it was necessary to use a rating procedure slightly different from that used by the LA police under actual operating conditions. The time available for each rating/evaluation was limited to 20 minutes; this is in contrast to approximately one hour which is normally required. The procedure was modified by substituting check lists for note taking and review, and did not include a search for physical evidence (e.g., bags of marihuana) or application of a breath alcohol test.

The modified rating procedure consisted of three components. First was a brief interview concerning the subject's medical and drug use history, and recent eating, sleep and alcohol use. This interview component provided a basis for evaluating alertness and responsiveness, speech and conversation characteristics, and mood and attitude. Second was examination of the objective physiological signs, including pulse rate, blood pressure, oral temperature, pupil size, pupil response to light and dark, eye gaze nystagmus, smoothness of visual pursuit, perspiration, and salivation. Third was a field sobriety test assessing psychomotor performance and ability to remember and follow instructions; this consisted of four

elements: standing steadiness and time perception, ability to balance on one foot, ability to walk a straight line, and ability to touch your nose with eyes closed.

As regards results, the LAPD raters were quite accurate in correctly classifying individuals that had not received a drug. Approximately 95% of these test subjects were classified as "not intoxicated." For individuals who did receive a drug, the extent to which the LAPD rates specified "intoxication" appeared to vary depending on the drug and dosage level. In general, the percentage of "intoxication" ratings increased as the dosage level increased. The table below summarizes these results:

Drug Condition	"Intoxication" Judgements (%)
Secobarbital	95%
Valium – High Dose	85.0%
Valium – Low Dose	52.5%
Marihuana – High Dose	72.5%
Marihuana – Low Dose	32.5%
d-Amphetamine – High Dose	27.5%
d-Amphetamine – Low Dose	17.5%
No Drug	5.0%

One other major aspect of this study was to determine the LAPD raters ability to correctly specify the drug class responsible for the "intoxication." The results indicate that the raters were quite accurate in this regard. For example, 97.5% of the subjects classified by the raters as intoxicated by marihuana had, in fact, received one of the marihuana drug treatments. The corresponding percentages for the stimulant and depressant drug classes are 80% and 92.7%.

In summary, (a) for certain drug-dose combinations most subjects were rated as intoxicated, but for other combinations most were not, (b) subjects rated as intoxicated had almost always received a drug and raters were quite accurate in specifying which drug had been given to the subjects they rated as intoxicated, and (c) subjects who did not receive a drug were almost always rated as not intoxicated.

A report documenting the overall results of this laboratory evaluation in detail is currently in preparation and will be published as a joint NHTSA/NIDA sponsored document. Subsequent reports will examine the specific components of the LA rating procedure and suggest improvements. It should be stressed that this was a partial evaluation of the LAPD Drugged Driver Detection Procedure carried out under controlled laboratory conditions with only four test drugs. A field evaluation of the drug detection program is planned for 1985 in order to provide important information on the utility of the procedure when applied by a wider range of officers looking for a larger number of drugs than the laboratory test would allow. This evaluation will be carried out under actual operating conditions in Los Angeles in cooperation with the Los Angeles Police Department.

May 1985

RESEARCH NOTES

U.S. Department
of Transportation

National Highway
Traffic Safety
Administration

FIELD EVALUATION OF THE LOS ANGELES POLICE DEPARTMENT DRUG DETECTION PROCEDURE

Richard P. Compton

The Los Angeles Police Department (LAPD) has developed a drug recognition procedure designed to enable police officers to identify and differentiate between types of drug impairment. The subject-examination procedure focuses on detecting the use of drugs which are believed to impair driving performance, with special attention given to abused substances, such as cocaine, marijuana and phencyclidine (PCP). The LAPD program involves training officers to detect the patterns of behavioral and physiological symptoms associated with major drug categories (e.g., stimulants, depressants, hallucinogens). The Los Angeles Municipal Courts accept the expertise and court testimony of officers certified through the LAPD training program. The certified officers are known as Drug Recognition Experts (DREs).

The drug evaluation procedure developed by the LAPD consists of three components. First is an "interview" concerning the suspect's medical and drug use history, recent eating, sleep and alcohol/drug use. During the interrogation the officer evaluates the suspect's alertness and responsiveness, speech characteristics, mood and attitude. The second component involves measuring objective physi-

ological symptoms including pulse rate, blood pressure, oral temperature, pupil size, pupillary reaction to light and dark, nystagmus, smoothness of visual pursuit, perspiration, condition of the tongue, salivation, and skin signs of substance abuse. Third, are a battery of behavioral tests designed to assess psychomotor performance, the ability to follow and remember instructions, and divided attention. Some of the behavioral tests are similar to those being used by police to test for alcohol impairment (e.g., the one-leg-stand and walk-and-turn tests).

The National Highway Traffic Safety Administration, in cooperation with the Los Angeles Police Department, has conducted a two-part evaluation of the drug recognition procedure. First, a small scale laboratory study of the LAPD procedure was conducted in which four LAPD drug recognition experts independently rated dosed subjects in a double blind test procedure (a technical report by Bigelow, 1985 on the laboratory study is available). The results showed that when subjects were rated as intoxicated by the DREs they had almost always received a drug, that the DREs ability to detect when subjects had received a drug varied by drug-dose combination, and that the DREs were quite accurate in correctly classifying individuals that had not received a drug (see Anderson, 1985). The results of the laboratory study were promising though limited because only four test drugs were used and the officers were evaluating the subjects under laboratory conditions.

The second step was to conduct a field study to obtain data from a wider range of police officers looking for a larger number of drugs in adult suspects under actual field conditions. This research note presents the results of the field study.

Study Design

The field study ran for three months during the summer of 1985. The study sample was composed of adult suspects arrested for DUI within the city of Los Angeles who were suspected by the arresting officers of being under the influence of a drug other than alcohol, and who were not involved in a crash. Suspects arrested during the operational period were taken to any one of a group of selected senior DREs for a drug evaluation.

If the DRE concluded that the suspect was under the influence of drugs the suspect was asked to take a blood test. The blood samples were shipped to an independent laboratory for analysis and were screened for the presence of certain commonly impairing drugs.

Selected Major Results

A total of 201 suspects were evaluated during the study by a DRE using the drug recognition procedure and were judged impaired by drugs other than alcohol. Blood samples were obtained from 173 of these suspects (86%). The suspects were primarily young males (average age was 27 years old, 90% were males). The suspects who did not provide a blood sample did not differ from the suspects who did in terms of age, sex, race, BAC level, day of week arrested, etc.

The analysis of the blood samples identified 13 different psychoactive substances. In order of declining frequency, the most often detected drugs were: phencyclidine (PCP), alcohol, marijuana (THC), morphine, cocaine, diazepam, and codeine. In only one suspect were no drugs or alcohol detected. Multiple drug use was very common with two or more drugs (including alcohol) detected in 72% of the

suspects. Over 40 different drug combinations were found.

In terms of the accuracy of the DREs judgments, the important findings were:

- *When the DREs claimed drugs other than alcohol were present they were almost always detected in the blood (94% of the time).* It was rare for the DREs to claim a suspect had used drugs and for no drugs to be found in the suspect's blood.
- *The DREs were able to correctly identify at least one drug other than alcohol in 87% of the suspects evaluated in this study.*
- *When the DREs identified a suspect as impaired by a specific drug, the drug was detected in the suspect's blood 79% of the time.*
- *The DREs were entirely correct in identifying all of the drugs detected in the blood of almost 50% of the suspects.* Most of these suspects had used multiple drugs (other than alcohol).
- *The use of alcohol in conjunction with other drugs was pronounced with 50% of the suspects who had used drugs having also used alcohol.* The presence of alcohol (a central nervous system depressant) made the DREs detection of other drugs more difficult.
- *Only 6 of the suspects (3.7%) who had used drugs had BACs equal to or greater than 0.10% w/v.* It is likely that most (if not all) of the remainder of the suspects would have been released if the drug symptoms had not been recognized by the DREs.

Conclusion

The results of the two studies conducted by NHTSA show that the LAPD drug recognition procedure enables the ex-

perienced police officer to accurately recognize the symptoms of many types of drug use by drivers. When the officers identify a suspect as having used particular drugs, a blood test almost always will confirm their judgment. Blood tests are not currently conducted on a routine basis because the cost of testing for many possible drugs is prohibitively expensive. Because this procedure allows the police to focus on a few specific drugs, the cost of the blood test should be much less expensive and could therefore be more routine. Information regarding the particular drugs used by DUI drivers should increase successful prosecutions. Thus, this procedure appears to be a useful tool that will greatly enhance the enforcement of "driving under the influence of drugs" laws.

References

- Anderson, T.E. *Laboratory Evaluation of the Los Angeles Police Department's Drugged Driver Detection Procedures*, May 1985, National Highway Traffic Safety Administration, Research Notes, U.S. Department of Transportation, Washington, DC.
- Bigelow, G.E., Bickel, W.E., Roache, J.D., Liebson, I.A., and Nowowieski, P. *Identifying Types of Drug Intoxication: Laboratory Evaluation of a Subject-Examination Procedure*, May 1985, National Highway Traffic Safety Administration, Report No. DOT-HS-806-753, U.S. Department of Transportation, Washington, D.C.

NOTE: A Technical Report entitled "*Field Evaluation Of The Los Angeles Police Department Drug Detection Procedure*," Report No. DOT HS-807-012, that provides a more complete and detailed description of the study and results is available by request from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

August 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2891

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
PLAINTIFFS-APPELLANTS

v.

JAMES H. BURNLEY, SECRETARY, DEPARTMENT OF
TRANSPORTATION, AND JOHN H. RILEY, ADMINISTRATOR,
FEDERAL RAILROAD ADMINISTRATION,
DEFENDANTS-APPELLEES

AFFIDAVIT OF JOSEPH W. WALSH

I, Joseph W. Walsh, being first duly sworn, say:

1. I am employed by the Federal Railroad Administration (FRA) of the Department of Transportation as the Associate Administrator for Safety. In that capacity, I plan, develop, and administer FRA's rail safety program, including enforcement of all Federal laws and regulations concerning railroad safety and investigation of serious railroad accidents and incidents. I report to the Administrator and serve as his principal advisor on railroad safety.

2. Prior to assuming my present position in 1979, I was employed by the Brotherhood of Railroad Signalmen as Vice President-National Legislative Representative. I served in that position from 1973 to 1979. I began my railroad career in 1942 on the New Haven Railroad Company and held a number of railroad positions prior to commencement of my employment with the signalmen's union.

3. My staff is responsible for implementing and enforcing FRA's regulations on the Control of Alcohol and Drug Use, 49 C.F.R. Part 219, compiling statistics on the results of post-accident testing required by those regulations, and investigating serious railroad accidents. In addition, I serve *ex officio* as the head of FRA's Railroad Safety Board, which issues findings of probable cause on certain railroad accidents and an annual summary of the circumstances surrounding employee fatalities. Therefore, I am quite familiar with how our regulations have been implemented, the data produced by our post-accident testing program, and the usefulness of toxicological testing information in accident investigations.

4. In brief summary, FRA's alcohol and drug regulations have a twofold purpose: (1) to deter alcohol and drug use by railroad employees in safety-sensitive positions, thereby preventing death, injuries, and property damage that would otherwise be caused by such use, and (2) to provide data necessary for a complete understanding of the possible causal factors of serious railroad accidents, which permits FRA to target enforcement, regulatory, and other responses.

5. The limited data available prior to the effective date of FRA's regulations (February 10, 1986) indicated that, from 1975 through 1984, alcohol or drug use had caused or contributed to the severity of 48 accidents or incidents resulting in 37 fatalities, 80 nonfatal injuries, and \$20.4 million in property damage. For a seven-year period prior to issuance of the regulations, sixteen percent (22 of 136) of the autopsies performed on employees killed in railroad accidents or incidents showed positive results for significant levels of alcohol or other drugs. This information, however, was most likely only part of the whole picture, as toxicological testing of employees who survived railroad

accidents, or who were directly involved in serious performance failures that did not cause accidents, was nearly nonexistent before the effective date of FRA's regulations. Further, drug toxicology as practiced in medical examiner's offices during the period usually did not include screens for drugs of abuse such as marijuana and cocaine.

6. From February 10, 1986, through December 31, 1987, 349 events occurred that qualified for post-accident testing under FRA's regulations. Attachment A is a chart showing the basic data obtained during that period. Of the employees tested as a result of their involvement in qualifying events, a total of 88 (or 5.8 percent) tested positive for either alcohol or drugs. This breaks down to 10 positives for alcohol (0.7 percent), 66 positives for controlled substances not medically authorized (4.4 percent), and 12 positives for medically authorized controlled substances (0.8 percent). The overall percentage rate for all positives (5.8 percent) is far lower than the 16 percent positive rate found in a seven-year period prior to the regulations' issuance for employees killed in railroad accidents and incidents, despite the fact that testing performed prior to the effective date of the rule was much less complete and less sensitive for drugs other than alcohol. Although neither these statistics nor others available are strictly comparable, we believe from the available data and daily contacts with the railroad industry that the rule has had a significant deterrent effect.

7. As shown by attachment A, the incidence of positive test results for employees tested under FRA's post-accident testing program actually declined in 1987 with respect to alcohol and medically authorized controlled substances. However, with regard to illicit drugs and legal drugs that were not medically authorized, the incidence among tested employees increased from 3.7 percent in

1986 to 5.1 percent in 1987. Although for technical reasons this may indicate more effective detection rather than an increasing rate of use, it does indicate a continuing need to address drug use in the railroad operating environment. Attachment B is a listing of each accident or incident in 1987 for which post-accident testing was performed.* As it reveals, the vast majority of positives detected in 1987 were for marijuana or cocaine, illicit drugs used secretively and with the purpose of avoiding identification.

8. There is no doubt that use of alcohol and drugs continues to play a causal role in some of the most serious rail accidents. The most notable example is the January 4, 1987 collision between an Amtrak passenger train and three Conrail locomotives at Chase, Maryland. That accident caused sixteen deaths and 174 injuries. Post-accident test results showed that the engineer and brakeman of the Conrail locomotives—who failed to observe signal indications and ran through a switch into the path of the high-speed Amtrak train—had marijuana metabolites in their blood and urine after the accident. (The brakeman also tested positive for PCP in the urine.) The National Transportation Safety Board concluded on January 20, 1988, that the leading contributing cause of this accident was the Conrail engineer's impairment by marijuana. On February 16, 1988, that engineer entered a guilty plea in a state prosecution to one count of manslaughter for his role in the accident, and signed a plea agreement and statement admitting that he and the brakeman had smoked marijuana in the locomotive cab a few minutes before the acci-

* Results from four accidents involving positives for four employees have been excluded because the employees' use of the substances found had been medically authorized. Due to privacy concerns involved in such findings, FRA discloses them only to the extent necessary to complete a related accident investigation.

dent. I am aware of no method other than toxicological testing that would have revealed this on-the-job drug use. In the absence of FRA's regulations requiring that testing, there is no reason to believe that it would have been performed on the employees involved in the Chase accident, since none of the officials who spoke with the engineer and brakeman on the scene of the accident reported any suspicion of impairment.

9. Although FRA is not able to conduct a full field investigation of all accidents for which mandatory alcohol/drug tests are performed, we do investigate a majority of those events. In a number of the investigations for which positive test results were obtained, we have indications that alcohol or drug use may have contributed to the cause of the accident. Attachment C is a listing of accidents or incidents in 1987 in which the presence of alcohol or drugs in employees has been identified by FRA as possibly contributing to the cause or severity of the event. Those accidents (including Chase, Maryland) and incidents resulted in 19 deaths, 226 injuries, the evacuation of more than 22,000 people, and over \$17 million in property damage.

10. I am extremely concerned about the possibility that the testing provisions of FRA's alcohol and drug regulations (except for reasonable suspicion and pre-employment drug screening) may be taken out of effect by court order. Alcohol and drug use has been found in a significant portion of railroad accidents and incidents where post-accident testing has been performed. While FRA's regulations have not eliminated alcohol or drug abuse from the railroad operating environment, I believe they have had a very substantial deterrent effect. This effect has been provided not only by mandatory post-accident testing (Subpart C of FRA's rule), but also by Subpart D authorized testing (which, in addition to au-

thorizing testing based on reasonable suspicion of impairment, includes authority to test employees (i) reasonably suspected of contributing to the cause or severity of an accident or incident that does not qualify for mandatory testing, or (ii) directly involved in a serious violation of safety rules). After beginning slowly due to the need to conduct training; make logistical arrangements, and gain experience, all major railroads are presently engaged in more active use of authorized testing or incident-driven testing under their own policies. It is critical that this activity continue in order to identify chronic substance abusers and to deter occasional users before they are the cause of death, serious injury, or the release of hazardous materials.

11. I also believe that, if the program is confined to reasonable suspicion testing, its effect will be vastly diminished. At best, only employees who believe their alcohol or drug use is likely to produce readily observable symptoms while in the presence of their supervisors would continue to be deterred. Through a long process of rulemaking and two years of program administration, FRA has learned that the great preponderance of drug use, and a significant amount of alcohol use, is not detectable through normal supervisory observations. I fear that this critical limitation on the detection system will result in deaths and injuries that could be avoided if the rule remains in effect.

12. I am also greatly concerned about the loss of data vital to accident investigations that would no doubt occur during the suspension of most of the regulations' testing provisions. The probable contributing factors are not often readily apparent in the immediate aftermath of a major railroad accident. The locomotives and rail cars involved, the track and signal systems in the vicinity, data from event recorders, the observations of witnesses and

employees involved, and all relevant documents must ordinarily be reviewed before conclusions can be reached. In many cases, testing of equipment or signal systems is essential. Careful analysis of each potentially causal factor is necessary. If we are required to revert to a system in which one essential piece of data—the presence of alcohol or drugs in the systems of employees involved in the accident or incident—is unavailable, our ability to correctly determine the cause will be diminished in a significant number of serious accidents. The public and employees protected by our regulations and enforcement actions will lose the benefit of the actions we would have taken based on correct determinations of cause in those accidents actually caused by alcohol or drug use but never revealed as such because of the lack of testing. Experience has shown that overt, readily discernible symptoms of alcohol or drug use are rarely, if ever, present in the aftermath of an accident. In the accidents FRA has investigated to date in which post-accident testing has revealed alcohol or drug use, only one of the employees involved (a case of gross alcohol intoxication) displayed observable symptoms before or after the accident that would have made testing possible under a standard requiring the presence of observable symptoms of alcohol or drug impairment. Had such a standard been in effect, all of the other data we have acquired would apparently have been lost.

13. Based on my 45 years of experience in the railroad industry as an employee, union official, and federal safety official, I am convinced that railroad employees, passengers, and segments of the general public potentially affected by railroad accidents are much safer with all of

the testing provisions of FRA's alcohol and drug regulations in effect than they would be without them.

/s/ JOSEPH W. WALSH

Subscribed and sworn to before me
this 22nd day of February 1988

Notary Public, HAROLD E. FINNEY
My commission expires: Feb. 14, 1990

ATTACHMENT A

U.S. Department
of Transportation

Federal Railroad
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

February 1988

SUMMARY OF POST-ACCIDENT TESTING EVENTS (49 CFR Part 219, Subpart C)

	Calendar 1986 (2/10/86 thru 12/31/86)	Calendar 1987 (12 mos.)	Cumulative Totals (2/10/86 thru 12/31/87)
Qualifying Events	170	179	349
Total Employees Sampled	738 (100%)	770 (100%)	1508 (100%)
Number of Sample Sets w/ Positive (Urine, Blood, or Both):			
Alcohol	7 (0.9%)	3 (0.4%)	10 (0.7%)
Controlled Substances — illicit or not medically authorized	27 (3.7%)	39 (5.1%)	66 (4.4%)
Total Alcohol/Illicit Drugs	34 (4.6%)	42 (5.5%)	76 (5.0%)
Controlled Substances — medically authorized	8 (1.1%)	4 (0.5%)	12 (0.8%)
Total Alcohol & Drugs	42 (5.7%)	46 (6.0%)	88 (5.8%)

(See Notes attached.)

NOTES:

1. Figures are stated on calendar year basis in order to establish a format for regular reporting. Previous summaries were based on partial years or other non-calendar year basis.
2. Post-accident testing was authorized as of February 10, 1986, and was mandatory as of March 10, 1986.
3. One alcohol positive for 1986 was deleted from the data base, since the railroad investigation determined that the employee consumed alcoholic beverages after having been released from work, but prior to being recalled for testing.
4. The data for medically authorized controlled substances have been adjusted by deleting 1986 positives for propoxyphene, a popular prescription analgesic (sold as Darvon, etc.). During early 1987, the decision was made to delete propoxyphene from the list of substances tested. Five (5) employees were reported positive for propoxyphene in 1986.
5. The following additional factors may affect comparability of 1986 and 1987 data:
 - a. Most 1986 drug urine screening was performed by enzyme multiplied immunoassay, while most 1987 screening was by radio immunoassay. Analytical techniques had slightly lower detection limits for certain analysis conducted in 1987.
 - b. Supervision of collection to avoid dilution or adulteration of urine specimens may have been more successful in the 1987 period due to accumulated experience of railroads and medical facilities.
 - c. Available assays do not presently permit detection of new low-dosage benzodiazepines that may be used in lieu of other tranquilizers such as diazepam (Valium).

6. Figures add. Where both a licit drug and illicit drug were detected, the entry has been credited to the illicit category. No sample sets were positive for both a controlled substance (C.S.) and alcohol. Some sample sets were positive for more than one licit C.S. or more than one illicit C.S., so the total number of positive findings is higher than displayed. All percentages may not add due to rounding.
7. Data for alcohol may understate incidence of accident involvement, since screening is performed on blood, and low levels of alcohol may in some cases be eliminated from the blood during the interval between the accident and sample collection.
8. Data are not conclusive of alcohol/drug role in individual accidents, except as may be developed through an accident investigation.

Post Accident Testing Results With Positive Test Results*
January 1, 1987 through December 31, 1987

Railroad	Date	Location	Type Accident	Position of Employee	Substance Found and Level (per ml)	Time of Accident	Approximate Time of Sample Collection
Amtrak/CR	01-04-87	Chase, MD	Fatality	Engineer	THC-COON 212 ng (U) THC-COON 52 ng (P)	1:30 p	6:30 p
				Brakeman	THC-COON 109 ng (U) THC-COON 15 ng (P) PCP 6 ng (U)	1:30 p	10:00 p
CSX	01-13-87	Reveries, OH	Impact/Tam.	Engineer	Alcohol .008 (B), .025 (U)	10:20 a	1:35 p
B&O	01-25-87	Pittsburg, MA	\$500,000+	Engineer	BE 234 ng (B) 3770 ng (U)	8:10 a	11:25 a
Metro North	02-17-87	New York, NY	Impact/Tam.	Engineer	THC-COON 18 ng (B) 289 ng (U)	7:10 p	12:28 a
SP	02-27-87	Cleveland, TX	\$500,000+	Conductor	THC 2 ng (B) THC-COON 58 ng (B) 201 ng (U)	2:38 p	8:15 p
NS	03-03-87	Knoxville, TN	Impact/Tam.	Hostler	THC 1 ng (B) THC-COON 24 ng (B) 196 ng (U)	5:10 p	7:00 p
UP	03-06-87	Green River, WY	Impact/Tam.	Conductor	THC-COON 55 ng (U)	5:05 a	7:05 a
				Pilot	THC-COON 41 ng (B) 134 ng (U)	5:05 a	7:15 a
UP	03-08-87	Monk Creek, ID	\$500,000	Brakeman	BE 254 ng (B) 502 ng (U)	2:15 a	10:00 a

* Including authorized use of therapeutic drugs

ATTACHMENT B

BN	03-19-87	Alvord, TX	\$500,000	Brakeman	THC 2.8 ng (B) THC-COON 59 ng (B) 92 ng (U)	10:30 p	5:55 a
NS	03-28-87	Pt. Wayne, IN	Fatality (TI)	Brakeman	THC 2.5 ng (B) THC-COON 33 ng (B) 217 ng (U)	10:30 a	6:25 p
Amtrak	04-10-87	New York, NY	Fatality (TI)	Conductor	BE 54 ng (B) 4130 ng (U)	8:47 p	3:00 a
				Brakeman	THC-COON 4.1 ng (B) 66 ng (U)	8:47 p	Fatality
CR	04-11-87	Pittsburgh, PA	RM/Thuc.	Engineer	Budabital 3,400 ng (B) Budabital 3,800 ng (U) Codeine 1,000 ng (U)	12:30 p	6:00 p
PATN	04-13-87	Edison, NJ	Impact/Tam.	Engineer	THC-COON 26 ng (U) BE 500 ng (B) BE 4,820 ng (U)	1:59 p	3:25 p
UP	04-25-87	Tuscarora, TX	Impact/Tam.	Brakeman	THC 1.3 ng (B) THC-COON 26 ng (B) 85 ng (U)	9:25 p	2:20 a
PATN	04-27-87	New York, NY	Impact/Tam.	Engineer	THC 1.7 ng (B) THC-COON 80 ng (B) 422 ng (U)	8:20 a	11:00 a
UP	04-29-87	Hertler, KS	\$500,000+	Brakeman	THC-COON 20 ng (B) 453 ng (U)	4:50 p	7:00 p
ICG	05-02-87	Gillman, IL	Impact/Tam.	Brakeman	BE 430 ng (U)	11:53 a	4:30 p
ATSP	05-09-87	Sweetwater, TX	Impact/Tam.	Pilot	THC 2 ng (B) THC-COON 120 ng (B) 126 ng (U)	8:05 a	3:35 p

CSX	05-12-87	Lexington, KY	HN/Basc.	Brakeman	THC-COOH 75 ng (B) 2,020 (U)	8:50 p	2:00 a
C&M	05-17-87	W. Fenard, ME	\$500,000+	Brakeman	THC-COOH 39 ng (B) 96 ng (U)	6:20 p	11:40 p
UP	05-22-87	Oakdash, ME	\$500,000+	Brakeman	THC-COOH 11 ng (B) 27 ng (U)	9:05 p	3:30 a
SP	06-15-87	Yuma, AZ	Fatality	Engineer	Alcohol .16% (Vitreous)	1:15 a	Fatality
UP	06-26-87	Council Bluffs, Iowa	Impact/Inj.	Brakeman	THC-COOH 4 ng (B) 78 ng (U)	7:35 p	10:00 a
UP	07-17-87	Weatherby, OR	Impact/Inj.	Pilot/Conductor	THC-COOH 3 ng (B) 21 ng (U)	9:45 p	1:00 a
OMW	08-10-87	E. St. Louis, IL	HN/Basc.	Conductor	THC-COOH 13 ng (B) 55 ng (U)	8:15 a	2:10 p
KCS	08-15-87	DeQuisen, AR	Impact/Dam.	Engineer	Alcohol .036% (B) .049% (U)	8:20 p	1:00 a
CSX	09-01-87	Cincinnati, OH	Fatality (TT)	Conductor	THC 1 ng (B) THC-COOH 124 ng (B) 84 ng (U)	4:15 p	8:16 p
BN	09-13-87	Lariat, WY	\$500,000+	Brakeman	THC 4 ng (B) THC-COOH 168 ng (B) 72 ng (U)	4:20 p	10:00 p
				Brakeman	THC-COOH 8 ng (B) 25 ng (U)	4:20 p	9:50 p
UP	09-17-87	N. Platte, NE	\$500,000+	Hostler	THC 1 ng (B) THC-COOH 45 ng (B) 178 ng (U)	9:30 p	12:47 a

ATSP	10-01-87	Brenham, TX	\$500,000+	Brakeman	THC-COOH 30 ng (B) 128 ng (U)	5:35 p	2:30 a
UP	11-08-87	Kamarar, WY	Fatality	Brakeman	Cocaine 170 ng (U) BE 140 ng (B) BE 21,200 ng (U)	6:07 a	12:25 p
B.T.	11-09-87	Lawrence, MA	Fatality (TT)	Brakeman	THC-COOH 20 ng (B) 45 ng (U)	4:15 p	9:20 p
CR	11-18-87	Johnstown, PA	Fatality (TT)	Engineer	BE 199 ng (U)	8:49 p	2:10 a
NS	12-02-87	Charleston, TN	HN/Basc.	Conductor	Methqualone 970 ng (B)	9:57 p	2:45 a
				Brakeman	THC 2 ng (B) THC-COOH 110 ng (B) 2,240 ng (U)	9:57 p	2:45 a
UP	12-06-87	Urenia, LA	\$500,000+	Fireman	THC-COOH 16 ng (B) 84 ng (U)	3:30 a	10:00 a
NS	12-21-87	Opelika, AL	\$500,000+	Engineer	THC 3 ng (B) THC-COOH 146 ng (B) 240 ng (U)	10:00 p	6:20 a
LI	12-29-87	New York, NY	Fatality (TT)	Engineer	THC-COOH 4 ng (B) 28 ng (U)	7:18 a	11:14 a

(U) Urine Level

(B) Whole Blood Level

(P) Plasma Level

THC-COOH - Delta - 9 Tetrahydrocannabinol - 9 - Carboxylic

Acid ("Carboxy THC"), Metabolite of Marijuana

BE - Benzoylecgonine, Principal Metabolite of Cocaine

PCP - Phencyclidine

T.I. - Train Incident

CALENDAR 1987 RAILROAD ACCIDENT/INCIDENTS INVOLVING PRESENCE OF ALCOHOL/DRUGS IN EMPLOYEES
IDENTIFIED AS POSSIBLY CONTRIBUTING TO THE CAUSE OR SEVERITY OF THE ACCIDENT/INCIDENT

Accident/Incident	Consequences	Role of Alcohol/Drugs
Chase, Md.; Conrail/Amtrak Jan. 4, 1987	Fatalities: 16 Injuries: 174 Damage: \$13,456,000	Engineer and brakeman of 3 locomotives failed to observe signal indications and ran through switch into path of passenger train, which struck locomotives from rear. Engineer tested positive for marijuana metabolite in the blood (55 ng) and urine (313 ng); specimens collected over 4 hours after accident. Brakeman tested positive for marijuana metabolite in blood (15 ng) and urine (188 ng) and for PCP in the urine (64 ng); specimens collected over 8 hours after accident. NTSB concluded that the probable cause of the accident was "the failure, as a result of impairment from marijuana, of the engineer of the Conrail train 208-131 to stop his train in compliance with [the] home signal" On Feb. 16, 1988, engineer entered guilty plea to one count of vehicular manslaughter, having stipulated to statement of facts describing on-duty use of marijuana by him and the brakeman.
*Ravenna, Ohio, CSX, Jan. 13, 1987	Damage: \$81,000	Freight train operated in violation of train order struck ballast regulator on track. Engineer tested positive for alcohol in the blood (.008%) and urine (.032%); samples collected 3 hours after accident.
*Knoxville, Tenn., MS, March 3, 1987	Injuries: 1 Damage: \$5,200	Hostler and hostler helper failed to make brake test before moving locomotive from yard to service area; locomotives collided with standing cars; helper tested positive for THC in blood (1 ng) and marijuana metabolite in blood (24 ng) and urine (188 ng); samples collected 1'30" after accident.

200

ATTACHMENT C

Pg. 3

Accident/Incident	Consequences	Role of Alcohol/Drugs
*Green River, Wyo., UP, March 8, 1987	Damage: \$46,000	Yard movements collided after conductor in charge of one and pilot (brakeman) of the other discussed the planned movements. Conductor tested positive for the marijuana metabolite in the urine (55 ng), and the pilot tested positive for the marijuana metabolite in the blood (41 ng) and urine (124 ng). Samples collected within approximately 3 hours.
Pittsburg, Pa.; Conrail, April 11, 1987	Damage: \$653,338 Hazardous Material: 25,000 evacuated; Injuries: 35 treated and released	Freight train operated overspeed on curve sideswiped train on adjoining track, resulting in a derailment, release of hazardous material, fire involving non-regulated commodities, and evacuation of 25,000 residents. Circumstances indicated intoxication by engineer of overspeed train, who had self-medicated with preparation containing butabital, a medium to long-acting barbiturate (central nervous system depressant). Last dose of drug was said to have been taken 35 hours prior to accident. The therapeutic level of drug remaining in his system may have adversely affected his alertness.
*New York, N.Y., Amtrak, April 16, 1987	Fatalities: 1	Assistant conductor fatally injured when crushed between locomotive and baggage car during switching movement. Samples from the assistant conductor, who was pronounced dead at the scene within approximately 30 minutes after the accident, tested positive for the marijuana metabolite in the blood (4 ng) and urine (88 ng). Samples received from the conductor, who may have been giving instructions for the movement, tested positive for the cocaine metabolite in the blood (24 ng) and urine (4.13 mcg); conductor's samples collected over 8 hours after accident.

201

<u>Accident/Incident</u>	<u>Consequences</u>	<u>Role of Alcohol/Drugs</u>
*Hoboken, N.J., PATH, April 12, 1987	Injuries: 1 Damage: \$13,100	Motorman cut out electro-pneumatic brakes and failed to stop short of bumping block; cocaine metabolite detected in blood (.10 mg) and urine (.43 mg) and marijuana metabolite in urine (26 ng); samples collected within 1.38".
*New York, N.Y., PATH, April 27, 1987	Injuries: 17 Damage: \$7,300	Rear-end collision; motorman of striking train passed restrictive signal; samples collected 3'48" after accident tested positive for THC (1.7 ng) and marijuana metabolite in blood (88 ng) and in urine (323 ng).
**Lexington, Ky., CBX, May 13, 1987	Hazardous Materials: 4 evacuated Damage: \$5,800	Brakeman placed derail in derailling position under movement, causing tank car to turn over and release hazardous materials; brakeman tested positive for marijuana metabolite in the blood (76 ng) and urine (2.83 mg). Samples collected over 4 hours after accident.
*Yuma, Arizona, SP, June 16, 1987	Fatalities: 1 Damage: \$1,637,100	Engineer of striking train failed to stop short under yard limit rule and was killed in collision; post mortem specimens indicate presence of ingested alcohol, with attained BAC prior to going duty in excess of .10% and with estimated BAC at death in the range of .04 to .24%. BAC at time of accident could not be determined with precision due to exsanguination of body.
**DeQueen, Ark., KCS, Aug. 15, 1987	Damage: \$145,000	Side collision; engineer of striking train, who failed to operate train in accordance with operating rules, tested positive for alcohol in blood (.036%) and urine (.849%); samples collected 4'45" after accident.

<u>Accident/Incident</u>	<u>Consequences</u>	<u>Role of Alcohol/Drugs</u>
*North Platte, Neb., UP, Sept. 10, 1987	Damage: \$371,000	Hostler left locomotive units unattended and without brakes, causing them to run uncontrolled into standing train. Hostler tested positive for THC (1 ng) and the marijuana metabolite (45 ng) in the blood and for the metabolite in the urine (176 ng); samples collected over 3 hrs. after accident.
*Cammerer, Wyoming, UP, Nov. 8, 1987	Fatalities: 1 Injuries: 8 Damage: \$886,000	Head-on collision between two freight trains. Front brakeman on eastbound train, which was not operated in accordance with signal indications, tested positive for cocaine in the urine (178 ng) and the cocaine metabolite in the blood (149 ng) and urine (21.3 mg). Samples collected over 6 hours after accident.

SUMMARY DATA:

No. of listed accidents/	13
incidents	
Fatalities	10
Injuries	236
Damage	\$17,330,170

LEGEND: ng - nanogram (0.00000001 gram) (expressed per milliliter)
 mcg - microgram (1,000 ng) (expressed per milliliter)
 THC - active compound in marijuana
 Damage - railroad property damage

*/ Still under investigation by FEA.

**/ No FEA field investigation; information developed from railroad reports and direct inquiries.

Note: Events for which alcohol/drug presence not deemed of significance in the investigation are not listed.

Supreme Court of the United States

No. 87-1555

JAMES H. BURNLEY IV,
SECRETARY OF TRANSPORTATION, ET AL.

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 6,
1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is set for oral argument in tandem with No. 86-1879, *National Treasury Employees Union v. Von Raab*.

A true copy JOSEPH F. SPANIOL, JR.

Test:

Clerk of the Supreme Court of the
United States

By _____
Deputy

In the Supreme Court of the United States

JOSEPH E. SPANIOLO, JR.

CLERK

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF
TRANSPORTATION, ET AL., PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

JAMES M. SPEARS
ROBERT J. CYNKAR
Deputy Assistant Attorneys General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHAITMAN

MARC RICHMAN
Attorneys

B. WAYNE VANCE
General Counsel
Department of
Transportation
Washington, D.C. 20590

S. MARK LINDSEY
Chief Counsel

GREGORY B. MCBRIDE
Assistant Chief Counsel

DANIEL CAREY SMITH
Deputy Assistant
Chief Counsel
Federal Railroad
Administration
Washington, D.C. 20590

Department of Justice
Washington, D.C. 20530
(202) 633-2217

55022

QUESTION PRESENTED

Whether regulations promulgated by the Federal Railroad Administration — mandating blood and urine tests of railroad employees who are involved in certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents, and rule violations — violate the Fourth Amendment on the ground that they do not require a showing of particularized suspicion of drug or alcohol impairment prior to the testing.

PARTIES TO THE PROCEEDINGS

The petitioners are James H. Burnley IV, Secretary of the Department of Transportation; and John H. Riley, Administrator of the Federal Railroad Administration. The respondents are the Railway Labor Executives' Association; the United Transportation Union General Committee of Adjustment, the Southern Pacific Company; the Brotherhood of Locomotive Engineers General Committee of Adjustment, the Southern Pacific Company; and the Brotherhood of Railroad Signalmen.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision and regulations involved	1
Statement:	
A. The Federal Railroad Administration regulations ...	2
B. The present controversy	13
Introduction and summary of argument	17
Argument:	
The FRA regulations are constitutional under the Fourth Amendment	19
A. A warrantless search may be valid even in the absence of particularized suspicion	19
B. The FRA regulations entail a minimal intrusion on employees' expectation of privacy	25
1. The employment relationship and the regulated nature of the industry	25
2. The constraints on official discretion	31
3. The narrowly-tailored nature of the testing procedures	33
C. The FRA regulations serve compelling governmental interests	36
Conclusion	44

TABLE OF AUTHORITIES

Cases:

<i>Almeida-Sanchez v. United States</i> , 413 U.S. 266 (1973) ..	21, 26
<i>Atchison, T. & S.F. Ry. v. United States</i> , 244 U.S. 336 (1917)	28, 37
<i>Baltimore & O.R.R. v. ICC</i> , 221 U.S. 612 (1911)	28
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	20
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982)	24
<i>Bratcher v. United States</i> , 149 F.2d 742 (4th Cir.), cert. denied, 325 U.S. 885 (1945)	36

IV

Cases—Continued:

	Page
<i>Brock v. Roadway Express, Inc.</i> , No. 85-1530 (Apr. 22, 1987)	37
<i>Brotherhood of Locomotive Engineers v. Burlington N.R.R.</i> : 838 F.2d 1087 (9th Cir. 1988)	29
<i>Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R.</i> , 393 U.S. 129 (1968)	27
<i>Camara v. Municipal Court</i> , 387 U.S. 523 (1967)	20, 21, 22, 31
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	20
<i>Colorado v. Bertine</i> , 479 U.S. 367 (1987)	21
<i>Communications Workers v. Beck</i> , No. 86-637 (June 29, 1988)	25
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	20, 21, 31
<i>Division 241 Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976)	16
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981)	20, 23, 33
<i>Flagg Bros. v. Brooks</i> , 436 U.S. 149 (1978)	24
<i>Great N. Ry. v. Minnesota</i> , 246 U.S. 434 (1918)	28
<i>Griffin v. Wisconsin</i> , No. 86-5324 (June 26, 1987)	21, 22
<i>Illinois v. Lafayette</i> , 462 U.S. 640 (1983)	39
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974)	24
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1987)	41
<i>Lehigh Valley R.R. v. Board of Public Utility Comm'rs</i> , 278 U.S. 24 (1928)	27-28
<i>Mackey v. Montrym</i> , 443 U.S. 1 (1979)	36, 37
<i>Marshall v. Barlow's, Inc.</i> , 436 U.S. 307 (1978)	21, 33
<i>McDonell v. Hunter</i> , 612 F. Supp. 1122 (S.D. Iowa 1985), aff'd, 809 F.2d 1302 (8th Cir. 1987)	17, 36
<i>Missouri P. Ry. v. Mackey</i> , 127 U.S. 205 (1888)	28, 37
<i>Munn v. Illinois</i> , 94 U.S. 113 (1877)	27
<i>National Treasury Employees Union v. von Raab</i> , 816 F.2d 170 (5th Cir. 1987), cert. granted, No. 86-1879 (Feb. 29, 1988)	16, 21, 42
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	17, 18, 19, 20, 21, 22, 24, 31

V

Cases—Continued:

	Page
<i>New York v. Burger</i> , No. 86-80 (June 19, 1987)	23, 26, 30, 31, 32
<i>New York v. Class</i> , 475 U.S. 106 (1986)	37
<i>New York Transit Authority v. Beazer</i> , 440 U.S. 568 (1979)	37
<i>O'Connor v. Ortega</i> , No. 85-530 (Mar. 31, 1987)	18, 22, 25, 26, 29, 30
<i>Pacific Gas & Elec. Co. v. Police Court</i> , 251 U.S. 22 (1919)	28
<i>Railway Employees Dep't v. Hanson</i> , 351 U.S. 225 (1956)	25
<i>Railway Labor Executives Ass'n v. Norfolk & W. Ry.</i> , 833 F.2d 700 (7th Cir. 1987)	29
<i>Rendell-Baker v. Kohn</i> , 457 U.S. 830 (1982)	24
<i>Rushton v. Nebraska Public Power Dist.</i> , 844 F.2d 562 (8th Cir. 1988)	30
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	24, 35, 36
<i>Seaboard Air Line Ry. v. Railroad Comm'n</i> , 240 U.S. 324 (1916)	28
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986)	17, 30
<i>South Dakota v. Dole</i> , No. 86-260 (June 23, 1987)	37
<i>St. Louis & S. F. Ry. v. Mathews</i> , 165 U.S. 1 (1897)	28
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	20
<i>United States v. Biswell</i> , 406 U.S. 311 (1972)	23, 32
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 (1975)	31
<i>United States v. Karo</i> , 468 U.S. 705 (1984)	21
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	18, 20, 22, 23, 43
<i>United States v. Montoya de Hernandez</i> , 473 U.S. 531 (1985)	17, 20
<i>United States v. Ortiz</i> , 422 U.S. 891 (1975)	31
<i>United States v. United States District Court</i> , 407 U.S. 297 (1972)	21
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983)	20, 22
<i>United Transportation Union v. Long Island R.R.</i> , 455 U.S. 678 (1982)	26
<i>Winston v. Lee</i> , 470 U.S. 753 (1985)	35
<i>Wyman v. James</i> , 400 U.S. 309 (1971)	20, 22

VI

Constitution, statutes and regulations:	Page
U.S. Const.:	
Amend. IV	1, 14, 17, 20, 21, 24, 25
Amend. V (Due Process Clause)	16
Accident Reports Act, ch. 208, § 1, 36 Stat. 350, 45 U.S.C. 38	26
Ash Pan Act, ch. 225, 35 Stat. 476, 45 U.S.C. 17 <i>et seq.</i> , repealed by the Federal Railroad Safety Authorization Act of 1982, Pub. L. No. 97-468, Tit. VII, § 705, 96 Stat. 2580	26
Block Signal Act, ch. 46, 34 Stat. 838, 45 U.S.C. 35	26
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(a)	23
Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III) 421 <i>et seq.</i>	27, 37
§ 202(a), 45 U.S.C. 431(a)	2, 27, 31, 37
§ 208(a), 45 U.S.C. 437(a)	28, 37
Hazardous Materials Transportation Act, 49 U.S.C. App. 1809	27
Hours of Service Act, ch. 2939, 34 Stat. 1415, 45 U.S.C. 61 <i>et seq.</i>	28
Locomotive Inspection Act, ch. 103, § 1, 36 Stat. 913, 45 U.S.C. 22	26
Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 624	28-29
Railway Labor Act, 45 U.S.C. 152	25
Safety Appliance Act, ch. 196, 27 Stat. 531, 45 U.S.C. 1 <i>et seq.</i>	26
Signal Inspection Act, ch. 91, § 441, 41 Stat. 498, 49 U.S.C. App. 26	27
Pub. L. No. 100-71, § 503(e), 101 Stat. 471	10
Mass. Ann. Laws ch. 160, §§ 178-181 (Law. Co-op. 1979)	29
49 C.F.R.:	
Pt. 209	27
Pt. 210	27
Pt. 213	27
Pt. 215	27

VII

Regulations—Continued:	Page
Pt. 217	27
Section 217.9	29
Section 217.11	29
Pt. 218:	
Sections 218.1-218.30	29
Sections 218.37	29
Pt. 219	7, 10
Subpt. A	7, 8
Section 219.1	32
Section 219.1(a)	37
Sections 219.1-219.21	7
Section 219.5(d)	8, 28
Section 219.5(e)	28
Section 219.13(a)	25
Subpt. B	7, 8
Section 219.101	7
Section 219.103	7
Subpt. C	7, 8, 24, 33, 34, 38
Sections 219.201-219.213	7
Section 219.201(a)(1)	8
Section 219.201(a)(2)	8
Section 219.201(a)(3)	8
Section 219.203(a)	8, 40
Section 219.203(a)(2)	9, 31
Section 219.203(a)(3)(i)	9, 31
Section 219.203(b)(1)	9, 32
Section 219.203(b)(2)	9, 35
Section 219.203(c)(1)	9, 32, 33, 36
Section 219.203(e)	9, 35
Section 219.205	9
Section 219.205(a)	9, 33
Section 219.205(c)	9
Section 219.205(d)	10, 33
Section 219.211(a)(2)	10, 33
Section 219.213	10, 34
Subpt. D	<i>passim</i>
Sections 219.301-219.309	10
Section 219.301(a)	32
Section 219.301(b)(1)	11, 15, 32, 42

VIII

Regulations—Continued:

	Page
Section 219.301(b)(2)	11, 32, 33
Section 219.301(b)(3)	11, 15, 32
Section 219.301(c)(1)	11, 32, 33
Section 219.301(c)(2)	15, 32, 42
Section 219.301(c)(2)(i)	11
Section 219.301(c)(2)(ii)	11
Section 219.301(f)	32
Section 219.303(a)(1)	11, 34
Section 219.303(a)(2)	11, 34
Section 219.303(a)(3)	11, 34
Section 219.303(a)(5)	11, 34
Section 219.303(c)	12, 34
Section 219.305(a)	11, 34, 36
Section 219.305(b)	11, 34
Section 219.305(d)	12, 34, 40
Section 219.307(a)(1)	11, 34
Section 219.307(a)(2)	12
Section 219.307(b)	11, 12, 34
Section 219.309	12
Subpt. E	7, 8, 35
Sections 219.401-219.407	8
Subpt. F	8
Sections 219.501-219.505	8
App. B	10
Pt. 220	27
Section 220.61	29
Pt. 221	27
Pt. 223	27
Pt. 225	27
Pt. 229	27
Pt. 231	27
Pt. 232	27
Pt. 233	27
Pt. 236	27

Miscellaneous:

Dubowski, <i>Drug-Use Testing: Scientific Perspectives</i> , 11 Nova L. Rev. 415 (1987)	41
--	----

IX

Miscellaneous—Continued:

	Page
Federal Railroad Admin., U.S. Dep't of Transp., <i>Field Manual: Control of Alcohol and Drug Use in Railroad Operation</i> (Mar. 1986)	10
48 Fed. Reg. (1983):	
p. 30723	2, 37
p. 30724	2, 3
p. 30726	3, 43
pp. 30726-30731	4
p. 30727	2
49 Fed. Reg. (1984):	
p. 24252	4
pp. 24252-24304	4
p. 24253	4
pp. 24253-24254	4
p. 24254	4, 5
p. 24256	4
pp. 24257-24260	4
pp. 24257-24264	4
p. 24259	4, 5
pp. 24262-24264	5
p. 24265	5
p. 24266	5
p. 24267	5
p. 24270	6
p. 24276	34, 35
p. 24281	5, 43
pp. 24284-24286	6
p. 24286	9
p. 24290	8
p. 24291	9, 40, 42
p. 24294	25
pp. 24294-24295	13
p. 24295	13
50 Fed. Reg. (1985):	
p. 31514	37
p. 31515	6
p. 31516	6, 7
p. 31520	7
p. 31521	7

Miscellaneous — Continued:

	Page
p. 31526	13, 42
p. 31527	7, 42
p. 31528	7
p. 31530	8
p. 31541	38, 39, 42, 43
pp. 31541-31542	13
p. 31542	8, 34
pp. 31542-31543	8
p. 31543	8, 35
p. 31544	9
p. 31546	10
p. 31550	13
p. 31551	24
p. 31553	32
p. 31555	12
pp. 31555-31556	10, 33
p. 31556	12, 35, 40
pp. 31568-31579	6
H.R. Rep. 91-1194, 91st Cong., 2d Sess. (1970)	36, 37
H.R. Rep. 100-637, 100th Cong., 2d Sess. (1988)	29
Hudner, <i>Urine Testing for Drugs</i> , 11 Nova L. Rev. 553 (1987)	41
Joseph, <i>Fourth Amendment Implications of Public Sector Work Place Drug Testing</i> , 11 Nova L. Rev. 605 (1987)	41

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF
TRANSPORTATION, ET AL., PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals declaring the regulations unconstitutional (Pet. App. 1a-49a) is reported at 839 F.2d 575. The opinion of the district court (Pet. App. 50a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1988. The petition for a writ of certiorari was filed on March 17, 1988, and was granted on June 6, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND
REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

(1)

Pertinent excerpts from the regulations involved in this case are reproduced in the appendix to the petition (Pet. App. 57a-78a) and in the Joint Appendix (J.A. 8-16).

STATEMENT

A. The Federal Railroad Administration Regulations

1. Section 202(a) of the Federal Railroad Safety Act of 1970, 45 U.S.C. 431(a), authorizes the Secretary of Transportation and, by delegation, the Federal Railroad Administration (FRA), to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." On July 5, 1983, pursuant to that authority (see 48 Fed. Reg. 30723), the FRA published an Advance Notice of Proposed Rulemaking (ANPRM)—commencing a process that would culminate, two years later, in the promulgation of regulations designed to control the use of alcohol and drugs by railroad employees engaged in railroad operations.

The FRA explained that the proposed rulemaking was prompted by pressing safety concerns. "Alcohol impairment and drug impairment," the agency observed, "have been identified as causal or contributing factors in a number of train accidents and employee fatalities over the past ten years." 48 Fed. Reg. 30723 (1983). The agency acknowledged (*id.* at 30724) that the railroad industry had taken steps to solve these problems on its own, especially by promulgating and enforcing "Rule G," an industry-wide operating rule that prohibits railroad employees from using, possessing, or being under the influence of alcohol or drugs while on duty.¹ The agency concluded, however, that "past FRA efforts to promote voluntary action by the railroad industry" to curb alcohol and drug abuse had "not met with uniform success" (*id.* at 30723).

For example, a 1979 study prepared by the Railroad Employee Assistance Project (REAP) examining the scope of

¹ The FRA found that "[v]irtually all railroads have adopted Rule G in one form or another" and it noted that "[t]he customary sanction for violation of Rule G is dismissal from employment." 48 Fed. Reg. 30727 (1983).

alcohol abuse on seven major railroads showed that "19% of all employees were 'problem drinkers'"; "23% of operating personnel were 'problem drinkers'"; "[o]nly 4% of problem drinkers were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures"; "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year (1978)"; "13% of workers reported to work at least 'a little drunk' one or more times during that period"; "13% of operating employees drank while on duty at least once during the study year, averaging about 3 such instances during the year"; and "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year." 48 Fed. Reg. 30724 (1983) (footnote omitted). The costs of alcohol abuse to the seven railroads, moreover, were estimated to be \$108 million in 1978, "suggesting industry-wide costs in that year of in excess of \$200 million" (*ibid.*). Drawing on that and other research, the FRA found that from 1972 to 1983 "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor" (*id.* at 30726). "Those accidents," the FRA stated (*ibid.*), "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars)." The FRA also identified (*ibid.*) "an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor."²

The agency accordingly solicited comments from interested parties on a variety of possible approaches to the problems of alcohol and drug abuse aboard the nation's railroads. It invited the public to address such disparate options as random drug and alcohol testing, testing on "reasonable suspicion," regularly scheduled "efficiency" testing for train operators, post-accident testing, increased observation of employees by supervisors, the

² The FRA noted, moreover (48 Fed. Reg. 30726 (1983)), that the available figures significantly understated the extent of the problem, since the threat of being held liable in tort and the risk of losing one's job discouraged the railroads and employees from accurately reporting the cause of accidents.

promotion of voluntary programs, and the possibility of no federal regulatory action at all. 48 Fed. Reg. 30726-30731 (1983).

2. Following the publication of the ANPRM, the FRA conducted several days of public hearings and received comments and related materials from a wide spectrum of interested parties. See 49 Fed. Reg. 24252 (1984). The agency carefully reviewed the materials produced in those proceedings and refined the data on which the proposed regulations would be based. On June 12, 1984, the FRA published a Notice of Proposed Rulemaking (NPRM), setting out in detail the factual basis for regulating the on-duty use of alcohol and drugs by railroad employees. 49 Fed. Reg. 24252-24304.

On the basis of the evidence submitted, the agency found that "[a] significant minority of railroad employees use alcohol and drugs in connection with railroad operations" and that "alcohol use and drug use are sufficiently common to pose a significant safety problem." 49 Fed. Reg. 24253 (1984). "Available information from all sources, including FRA safety investigations, suggests that the problem includes 'pockets' of drinking and drug use involving multiple crew members (before and during work), sporadic cases of individual employees reporting to work impaired, and repeated drinking and drug use by individual employees who are chemically or psychologically dependent on those substances" (*id.* at 24253-24254). "Even without the benefit of regular post-accident testing," the agency observed (*id.* at 24254), "FRA has identified 34 fatalities, 66 injuries and over \$28 million in property damage (in 1983 dollars) that resulted from the errors of alcohol and drug-impaired employees in 45 train accidents and train incidents during the period 1975 through 1983." ³ And, the FRA noted (*ibid.*), "[t]he

³ Table 1 of the NPRM (49 Fed. Reg. 24256 (1984)) contains a breakdown of the 45 accidents, showing the number of fatalities and injuries and the extent of the damage to railroad property. The FRA also analyzed those accidents in finer detail (*id.* at 24257-24264). For example, Table 2 (*id.* at 24257-24260) examines the accidents specifically investigated by the FRA. Those include a 1982 derailment in Livingston, Louisiana (*id.* at 24259), in

1984 toll may set a new record." ⁴

In determining to promulgate federal regulations, the FRA found wanting the existing approaches to alcohol and drug abuse among railroad employees. The agency observed that the enforcement of Rule G by the railroads, chiefly through "supervisory observations and punishment of offenders" (49 Fed. Reg. 24266 (1984)), was inadequate in many cases; "[a]t a more serious level," it added, the widespread perception of "unchecked management discretion to excuse or punish" had undermined employees' acceptance of Rule G itself (*id.* at 24267). ⁵ The agency also found (*id.* at 24281) that there was a "conspiracy of silence" regarding Rule G violations, "at least par-

which, as a result of alcohol consumption by the engineer and front brakeman, hazardous material was released into the atmosphere, causing "the evacuation of an entire community of 2,700 persons, some of whom were unable to return to their homes for an extended period" (*id.* at 24254). Also included is a 1980 rear end collision in Pismo, California, in which, as a result of alcohol consumption, an engineer operated the train at excessive speed and a brakeman failed to take appropriate action (*id.* at 24259), "result[ing] in the release of a combustible liquid from the dome of a tank car that burned for 18 hours" (*id.* at 24265). Table 4 of the NPRM lists employee fatalities investigated by FRA between 1975 and 1982 and sets out the laboratory results of alcohol and drug testing, as well as the nature of the accident in each case (*id.* at 24262-24264).

⁴ The FRA further observed (49 Fed. Reg. 24254 (1984)) that "the documented data tell only a part of the story. Many alcohol and drug-related accidents and injuries are not so recorded under the existing reporting system. From available information, it appears highly probable that because of the latitude present in that system the railroads either fail to detect or fail to report alcohol and drug involvement in a significant number of cases." The agency noted (*ibid.*) that "of 15 significant train accidents identified by [the National Transportation Safety Board] or FRA investigations as involving alcohol or drugs, the respective railroads reported alcohol or drug involvement in only 6." And it added (*ibid.*) that "[t]he under-reporting of alcohol and drug involvement is likely even more pronounced in the vast majority of accidents which do not occasion a Federal investigation."

⁵ The FRA explained (49 Fed. Reg. 24267 (1984)) that "[s]uch broad discretion need not be abused to create an impression of unfairness that can erode the perceived legitimacy of the rule. It is enough if employees believe such discretion is subject to unchecked abuse."

tially because the conventional sanction for a violation is dismissal." Voluntary rehabilitation programs, moreover, had achieved only mixed results; the FRA determined from the data that "most problem drinkers remain unidentified and unserved after a decade of voluntary efforts" and that "[t]reatment of drug abusers presents an even more difficult topic of analysis" since very few rehabilitation programs had been providing services to drug abusers (*id.* at 24270).⁶

3. a. On August 2, 1985, after reviewing extensive comments from representatives of the railroad industry, labor groups, and the general public, the FRA published the regulations that are at issue in this lawsuit (50 Fed. Reg. 31568-31579; Pet. App. 57a-78a; J.A. 8-16). In a detailed preamble to the regulations—copies of which have been lodged with the Court for its convenience—the agency set out its factual findings and meticulously explained its regulatory choices.

The FRA found that both alcohol and drug use remained "reasonably prevalent" among railroad employees (50 Fed. Reg. 31515 (1985)), and, indeed, that "[t]he 1984 toll of alcohol and drug-related accidents may have represented a new record, at least in the train accident category" (*id.* at 31516). The agency added to its earlier list three 1984 train accidents in which alcohol or drug use was a causal factor.⁷ It also identified four

⁶ The FRA also considered several other regulatory options, including requiring railroads to report all Rule G violations; making improvements in railroad life style; using motor vehicle records to identify alcohol and drug abusers; installing devices to halt trains where the engineer is incapacitated; establishing a toll free number that employees could use to report safety violations on an anonymous basis; and requiring all railroad employees to ride at the front end of each train, on the assumption that the presence of more employees would discourage the use of drugs or alcohol. 49 Fed. Reg. 24284-24286 (1984).

⁷ These included a rear end collision in Greystone, New York, in which an engineer, who later tested positive for barbiturates, failed to control the train in accordance with signal indications; a head-on collision in Wiggins, Colorado, in which an engineer was intoxicated, in which five persons were killed and two others injured, and in which nearly \$4 million in damage to railroad property was sustained; and a derailment in Silver Bow, Montana, in which

other '984 accidents that involved alcohol or drugs but for which the data was insufficient to assert positively that alcohol or drug use was a causal factor.⁸ Finding that "[c]onventional methods of controlling the alcohol/drug problem ha[d] proven inadequate by themselves" and that "[e]xclusive reliance on voluntary programs [was] not warranted by available information" (*id.* at 31527 (emphasis omitted)), the FRA concluded that "[t]he issuance of necessary and appropriate Federal regulations [was] required" (*id.* at 31528 (emphasis omitted)).

b. The final regulations (49 C.F.R. Pt. 219) consist of six subparts.⁹ Subpart C (*id.* §§ 219.201 to 219.213; Pet. App. 58a-

one person was killed, three others were injured, and over \$1.3 million in damage to railroad property occurred. 50 Fed. Reg. 31520 (Table 2) (1985). See also J.A. 132-133 (letter prepared by the National Transportation Safety Board).

⁸ These included a rear end collision in Newcastle, Wyoming, in which an engineer, who later tested positive for marijuana, failed to control the train in accordance with signal indications, and in which two persons died, two others were injured, and more than \$1.3 million in damage to railroad property occurred; a rear end collision in Carbondale, Illinois, in which both an engineer and front brakeman failed to take appropriate action; a side collision in Camden, Arkansas, in which a fireman operating the train tested positive for marijuana and an engineer, who left the scene of the accident, was observed to have consumed alcohol; and a side collision in Alvarado, Texas, in which the front brakeman, who failed to take appropriate action, tested positive for alcohol, marijuana, and methamphetamine, the engineer, who failed to control the train, appeared to witnesses to have consumed alcohol, and in which one person died, another person was injured, and nearly \$2 million in damage to railroad property took place. 50 Fed. Reg. 31521 (Table 2a) (1985). The FRA "call[ed] attention" to these accidents "because they indicate the possible involvement of alcohol and drugs in some of the more serious events of the past year and the difficulty faced by the investigating agencies, particularly in the absence of clear procedures to ensure that toxicological samples will be promptly obtained" (*id.* at 31516). See also J.A. 131 (National Transportation Safety Board).

⁹ The present litigation principally involves Subparts C and D of the regulations. In addition to those sections, Subpart A (J.A. 8-16) sets out some general provisions (49 C.F.R. 219.1 to 219.21), Subpart B (Pet. App. 57a-58a) states a general prohibition of alcohol and drug use (49 C.F.R. 219.101, 219.103), Subpart E establishes policies for identifying alcohol and drug

68a) is entitled "Post-Accident Toxicological Testing." It provides (49 C.F.R. 219.203(a)) that railroads "shall take all practicable steps to assure that all covered employees of the railroad directly involved * * * provide blood and urine samples for toxicological testing by FRA" after any one or more of the following three circumstances: (1) a "major train accident"—defined as one that includes either a fatality, the release of hazardous material accompanied by an evacuation or reportable injury, or damage to railroad property of \$500,000 or more (*id.* § 219.201(a)(1)); (2) an "impact accident" (collision) that results in a reportable injury or damage to railroad property of \$50,000 or more (*id.* § 219.201(a)(2)); or (3) a "train incident that involves a fatality to any on-duty railroad employee" (*id.* § 219.201(a)(3)).¹⁰

The post-accident regulations in Subpart C, like the other portions of the final rule, apply to "covered employees" (49 C.F.R. 219.203(a)), defined in pertinent part as persons who have "been assigned to perform service subject to the Hou[rs] of Service Act (45 U.S.C. 61-64b)" (49 C.F.R. 219.5(d); J.A. 9)—which includes essentially all "train and engine crews, yard crews (including switchmen), hostlers, train order and block operators, dispatchers, and signalmen" (50 Fed. Reg. 31530 (1985)). The FRA recognized that other groups of employees "also play an important role in maintaining the safety of rail operations," but it found that "[t]he available accident statistics confirm that the biggest part of the alcohol and drug problem

abusers and referring them for treatment (*id.* §§ 219.401 to 219.407), and Subpart F creates a system for pre-employment screening (*id.* §§ 219.501 to 219.505). The constitutionality of Subparts A, B, E, or F is not presently at issue.

¹⁰ The FRA concluded that the three triggering events were "of substantial public interest" and were "accidents for which, based on FRA's experience, causal determination is often extremely difficult." 50 Fed. Reg. 31542 (1985). The agency recognized, however, that the "burdens on employees and the railroads should be subject to reasonable limitations" (*id.* at 31543). It therefore adopted a "scaled-down" version of the triggering events relative to what had been initially proposed (see *id.* at 31542-31543). See pages 34-35 note 35, *infra*.

* * * is concentrated among the[] crafts that perform 'covered service.' " 49 Fed. Reg. 24286 (1984).¹¹

After one of the three triggering events occurs, both blood and urine samples must be taken. The FRA noted that a blood sample "can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects" (49 Fed. Reg. 24291 (1984)).¹² Railroads must "make every reasonable effort to assure that samples are provided as soon as possible" (49 C.F.R. 219.203(b)(1)). Toward that end, employees must "be transported to an independent medical facility where the samples shall be obtained" by qualified medical personnel (*id.* § 219.203(c)(1)).¹³ The regulations also establish procedures for collecting and handling the samples (*id.* § 219.205).¹⁴

¹¹ The regulations also provide that railroads must test "each and every operating employee assigned as a crew member of any train involved in the accident or incident" (49 C.F.R. 219.203(a)(2); Pet. App. 60a), unless, in the case of an "impact accident" or "fatal train incident," the "railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident" (49 C.F.R. 219.203(a)(3)(i)). FRA's decision to cover all operating employees in a particular train crew "reflects the fact that operating employees are most often at fault in alcohol and drug-related accidents and that some alcohol and drug-caused accidents in the past have involved apparent sequential or simultaneous failures of performance by two or more crew members. It also reflects the extreme difficulty of distinguishing fault and degrees of fault immediately after the more substantial accidents subject to this section." 50 Fed. Reg. 31544 (1985).

¹² See also J.A. 63 (testimony from the National Institute on Drug Abuse).

¹³ The regulations make clear, however, that, in the aftermath of an accident, a covered employee must be permitted to discharge whatever duties "may be necessary for the preservation of life or property" (49 C.F.R. 219.203(b)(2); Pet. App. 61a). Moreover, "[n]othing in this subpart shall be construed to limit the discretion of a physician to determine whether drawing a blood sample is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood" (49 C.F.R. 219.203(e); Pet. App. 62a).

¹⁴ Those regulations, in turn, make reference (49 C.F.R. 219.205(a) and (c); Pet. App. 62a-63a) to the FRA *Field Manual*—a booklet prepared by the agency that provides guidance to the industry in complying with the regulations.

After the samples have been collected, the railroad is required to ship them by pre-paid air freight to the FRA laboratory—presently the Center for Human Toxicology at the University of Utah (see 49 C.F.R. Pt. 219 App. B)—for analysis (49 C.F.R. 219.205(d); Pet. App. 63a). There, the samples are analyzed using “state-of-the-art equipment and techniques to detect and quantify alcohol and drugs” (Federal Railroad Admin., U.S. Dep’t of Transp., *Field Manual: Control of Alcohol and Drug Use in Railroad Operation* B-12 (Mar. 1986) [hereinafter *Field Manual*]). In particular, “[e]thyl alcohol is measured by gas chromatography. Drug screens may be conducted by immunoassay and other techniques. Positive drug findings are confirmed by gas chromatography/mass spectrometry” (*ibid.*; see also 50 Fed. Reg. 31555-31556 (1985)). Thereafter, the FRA notifies employees of the results of the tests and affords them an opportunity to respond in writing prior to the preparation of any final investigative report (49 C.F.R. 219.211(a)(2)).¹⁵ Employees who refuse to provide required blood or urine samples may not perform covered service for a period of nine months, but they are entitled to a hearing concerning their refusal to take the test (*id.* § 219.213)).¹⁶

c. Subpart D of the regulations (49 C.F.R. 219.301 to 219.309) is entitled “Authorization to Test for Cause.” It authorizes (but does not require) railroads to mandate breath or urine tests (but not blood tests) for covered employees under specified circumstances. Breath tests may be ordered (1) where a supervisor has a “reasonable suspicion” that an employee is

¹⁵ Unlike the Customs drug-testing program at issue in *National Treasury Employees Union v. von Raab*, No. 86-1879, there is no prohibition on the release of FRA testing results to prosecutors. Compare Pub. L. No. 100-71, § 503(e), 101 Stat. 471.

¹⁶ At a disqualification hearing—whose format was derived, in part, from comments submitted by the American Civil Liberties Union (50 Fed. Reg. 31546 (1985))—an employee “can contest whether there was a refusal, whether the accident or incident required testing (or whether, in a marginal case, the railroad representative made a good faith determination that it did), and whether, in a case where blood was refused based on health concerns, the refusal was made in good faith and based on medical advice” (*ibid.*).

under the influence or is impaired by alcohol, based upon specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee (*id.* § 219.301(b)(1)); (2) in the event of a reportable accident or incident, where a supervisor has a reasonable suspicion that the employee’s acts or omissions contributed to the occurrence or severity of the accident or incident (*id.* § 219.301(b)(2)); or (3) in the event of certain specific rule violations, including non-compliance with a signal, excessive speeding, improper switch alignment, failure to stop short of a derail, and failure to secure a hand brake (*id.* § 219.301(b)(3)). Urine tests may be ordered under circumstances (2) and (3) above (*id.* § 219.301(c)(1)); they may also be ordered in cases of “reasonable suspicion,” but only if two supervisors make the appropriate determination (*id.* § 219.301(c)(2)(i)) and, where the supervisors suspect impairment due to a drug other than alcohol, at least one of those supervisors must have received specialized training in detecting the signs of drug intoxication (*id.* § 219.301(c)(2)(ii)).

The authorizing regulations also establish procedures and safeguards for conducting breath and urine tests. Only certain designated breath-test devices may be used; the devices must be properly maintained and calibrated; and the tests must be conducted by a trained and qualified operator (49 C.F.R. 219.303(a)(1), (2), and (3)). If a breath test proves positive, the employee must be retested after 15 minutes have passed, in order to confirm the initial finding (*id.* § 219.303(a)(5)). Urine, in turn, may be collected only at an independent medical facility and the collection must be supervised by personnel of that facility (*id.* § 219.305(a)). Railroads must also establish with the participating medical facility procedures sufficient “to ensure positive identification of each sample and accurate reporting of laboratory results” (*id.* § 219.305(b)). The testing of the urine must be performed by an independent laboratory “proficient in the testing of urine for alcohol and drugs of abuse” (*id.* § 219.307(a)(1)), and each sample must “be analyzed by a method that is reliable within known tolerances” (*id.* § 219.307(b)). If a screening test is positive for a substance other

than alcohol, a remaining portion of the sample must be re-tested, using a "scientifically-recognized method capable of providing quantitative data specific to the drug (or metabolite(s)) detected" (*id.* § 219.307(b)).¹⁷ Moreover, any laboratory that performs confirmatory testing must also participate in an external quality control program, including, where practicable, the use of blind samples (*id.* § 219.307(a)(2)).

Whenever the results of either breath or urine tests are intended for use in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility (49 C.F.R. 219.303(c), 219.305(d)). If an employee declines to provide a blood sample, the railroad may presume impairment from the presence of an identified controlled substance in the urine (in the absence of persuasive evidence to the contrary), but the railroads must provide detailed notice to employees of that presumption and advise employees of their right to provide a contemporaneous blood sample (*id.* § 219.309).

d. The FRA identified "at least five independent, if related, bases for mandating post-accident testing." First, the agency determined that post-accident testing "is needed to guide FRA enforcement efforts under the[] new rules" by "indicat[ing] the persistence, or emergence of alcohol and drug problems on individual railroads." Second, the FRA explained, "post-accident testing is necessary to the process of regulatory development" because "[e]nlightened and proportional regulation will only be possible if the true causes of major human factor accidents are

¹⁷ The FRA made clear that an immunoassay would not constitute an acceptable confirmatory test (49 C.F.R. 219.307(b)) because immunoassay tests "generally carry the potential for a known percentage of 'false positive' results." 50 Fed. Reg. 31555 (1985). Instead, although the FRA did not specifically prescribe the use of the gas chromatography/mass spectrometry test – in order not to "usurp the role of the scientific community in establishing the reliability of existing assays and development of new assays" (*id.* at 31556) – the agency noted that GC/MS is generally "the current state of the art with respect to confirmation of drugs of abuse" (*id.* at 31555) and observed that its own laboratory would be using GC/MS in conducting the confirmatory testing of post-accident samples under Subpart C (*id.* at 31556).

known."¹⁸ Third, the agency reasoned, post-accident testing would provide important information to the public at large concerning the causes of major accidents. Fourth, it stated, such testing would "help to deter employees from using alcohol and drugs on the job."¹⁹ Finally, it said, post-accident testing is "a means of keeping the alcohol and drug problem squarely before the railroad industry" so that "progress [may be] sustained over the long term * * *." 50 Fed. Reg. 31541-31542 (1985).

The FRA further explained that the authority conferred by Subpart D would assist railroads to enforce rules against drug or alcohol use by on-duty employees and enhance their ability to identify the human causes of accidents, incidents, and rule violations. 49 Fed. Reg. 24294-24295 (1984). The agency also pointed out that testing under Subpart D would measurably improve the ability of the railroads to detect alcohol and drug violations by employees (see 50 Fed. Reg. 31550 (1985)) and would thereby promote overall deterrence (see *id.* at 31526). The FRA emphasized, however, that Subpart D is intended to be "permissive only; no particular test or series or program of testing is required or compelled by this section, and any such test or tests actually undertaken by the railroad are done at its initiative and not directly or indirectly at the instance of FRA." 49 Fed. Reg. 24295 (1984).

B. The Present Controversy

1. Respondents, the Railway Labor Executives' Association and various of its member labor organizations, brought this

¹⁸ As the National Transportation Safety Board (NTSB) (an independent federal agency responsible for investigating major transportation accidents) explained in support of the FRA regulations, "one of the major difficulties in addressing the alcohol/drug abuse problem continues to be inadequate statistics." Moreover, the Board reported, "[i]nvestigation of accidents has been hampered because toxicological tests for alcohol-drug use are not made after serious railroad accidents when the employees responsible for the operation of the train are not fatally injured." J.A. 130-131.

¹⁹ The NTSB agreed that post-accident blood and urine testing, as proposed by the FRA, "would be a powerful incentive to comply with the existing rules prohibiting alcohol and drug use" (J.A. 135).

action seeking to enjoin the FRA regulations on a variety of statutory and constitutional grounds. In an opinion issued from the bench (Pet. App. 50a-56a), the district court granted summary judgment in petitioners' favor. The court explained (*id.* at 52a-53a) that railroad personnel have a valid Fourth Amendment interest "in the integrity of their own bodies," but that there is also a competing "public and governmental interest in the * * * promotion of * * * railway safety, safety for employees, and safety for the general public that is involved with the transportation." In striking the appropriate balance, the court emphasized (*id.* at 53a) "that the railroad industry is one of the most extensively regulated industries that we have in interstate commerce; and that the regulation[s] extend[] not just to the railroads themselves, but a certain amount of regulation of the employees." Applying the criteria for assessing the reasonableness of a search within a "pervasively regulated" industry (*ibid.*), the court noted (*id.* at 53a-55a) that the FRA regulations serve "a valid governmental and public interest"; that there are "objective event[s] which trigger[] the testing" which are "as well defined as a set of regulations could give"; and that the regulations make a "genuine attempt * * * to limit the scope of the testing requirements to the needs and the events as they have occurred." The court accordingly held that the Fourth Amendment balance "is being struck in favor of the regulatory scheme" (*id.* at 53a).²⁰

2. A divided court of appeals reversed (Pet. App. 1a-49a). The court held, first (*id.* at 8a-13a), that drug and alcohol tests are searches within the meaning of the Fourth Amendment, and that Subpart D of the regulations involves sufficient governmental action to implicate the Fourth Amendment, even though that subpart only authorizes, but does not require, the adoption of testing procedures by otherwise private railroads. The court therefore turned to whether the regulations were constitutionally reasonable. It "agree[d] that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require

²⁰ The district court rejected (Pet. App. 51a-52a) as meritless respondents' other constitutional and statutory challenges to the regulations.

prompt action which precludes obtaining a warrant" (*id.* at 16a). It also acknowledged (*id.* at 24a) that "accommodation of railroad employees' privacy interest with the significant safety concerns of the government does not require adherence to a probable cause requirement." The court held, however (*id.* at 25a), that "particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception" and, because all but one provision of the regulations were wanting in that respect,²¹ the court struck them down.²²

Elaborating on its understanding of the "particularized suspicion" standard, the court of appeals emphasized (Pet. App. 25a-26a) that "[a]ccidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." The court also surmised (*id.* at 26a) that it would "pose[] no insuperable burden on the government to require individualized suspicion," noting (*ibid.*) that such a standard was already codified in certain Subpart D provisions (see 49 C.F.R. 219.301(b)(1) and (c)(2)), and reasoning (Pet. App. 26a-27a) that the same standard "should be incorporated into the mandatory testing provisions set out in 49 C.F.R. § 219.201 and the other authorized testing provisions set out in 49 C.F.R. § 219.301(b)(2) and (3)." In addition, the court explained (Pet. App. 28a) that in the absence of a requirement of particularized suspicion, it would be troubled by a

²¹ The court of appeals did not invalidate 49 C.F.R. 219.301(b)(1) and (c)(2), which authorize breath and urine testing on a "reasonable suspicion" of alcohol or drug impairment or intoxication.

²² In insisting on a requirement of particularized suspicion, the court of appeals rejected (Pet. App. 16a-17a) the district court's finding "that the[] regulations should be evaluated under the standards applicable to administrative inspections of pervasively regulated industries." The court explained (*id.* at 18a) that "[a]ll of the decisions in this line of cases have upheld warrantless searches of property, not of persons," and it "decline[d] to make such an extension in this case." It also stated (*id.* at 19a) that "[a]lthough some railroad safety regulations are directed at employees, * * * the vast bulk of safety legislation is directed at owners and managers of railroads, not their employees."

further "flaw in the reasonableness of this approach to the problem"—the inability of the drug tests to "measure current drug intoxication or degree of impairment," rather than merely "the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug" (*ibid.*). Reversing the judgment of the district court, the court of appeals held that "intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment" (*id.* at 36a).²³

Judge Alarcon dissented (Pet. App. 37a-49a). In his view (*id.* at 39a (emphasis in original)), "the activities of railway *personnel* are closely regulated to promote safety." He would therefore have held "that the closely regulated industry exception to the requirement of a warrant and probable cause applies to blood, breath, and urine tests of railway employees under the specific circumstances prescribed in the regulations challenged in this action" (*ibid.*). Moreover, Judge Alarcon would have found the FRA regulations constitutionally acceptable, even apart from the regulated nature of the industry. Noting that the court's holding was in conflict with decisions in several other circuits (*id.* at 42a),²⁴ Judge Alarcon criticized the majority for

²³ The court agreed, however (Pet. App. 29a), that "[t]he manner of conducting the tests is generally reasonable in that they are performed in medical facilities. 49 C.F.R. § 219.203(c)." And the court acknowledged (*ibid.*) that "[t]he intrusiveness of the process of urine testing has been reduced as much as is practicable in that only personnel of the medical facility may supervise the sample collection. 49 C.F.R. § 219.305(a)." The court also rejected respondents' other challenges to the FRA regulations predicated on statutory grounds (Pet. App. 32a-34a), the right to privacy (*id.* at 34a-35a), and the equal protection component of the Due Process Clause (*id.* at 35a-36a).

²⁴ The court itself acknowledged (Pet. App. 30a) that its decision "may be seen as conflicting with decisions of other circuits" and it criticized or distinguished (*id.* at 31a-32a) decisions of the Fifth Circuit in *National Treasury Employees Union v. von Raab*, 816 F.2d 170 (1987), cert. granted, No. 86-1879 (Feb. 29, 1988); the Seventh Circuit in *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, cert. denied, 429 U.S. 1029 (1976); the

"fail[ing] to engage in [a] balancing of interests" and for focusing instead "solely on the degree of impairment of the workers' privacy interests" (*id.* at 46a). A proper balance, the dissent observed (*ibid.*), would have recognized "that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests."

INTRODUCTION AND SUMMARY OF ARGUMENT

After several years of detailed study, the FRA concluded that alcohol and drug abuse by railroad employees had become a serious threat to the safe operation of the nation's railroads. To deter that abuse, and to assist in determining the causes of significant accidents and incidents, the agency promulgated regulations that mandate blood and urine testing, and that authorize breath and urine testing, pursuant to carefully circumscribed criteria. The court of appeals invalidated those regulations, however, because they do not impose an across-the-board requirement of particularized suspicion. We believe that the court's decision is mistaken.

A. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable" (*New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)). What is reasonable, however, "depends on the context within which a search takes place" (*id.* at 337). The reasonableness of a particular search practice "is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citation omitted).

Applying this balancing test, the Court has emphasized that a search may be reasonable under the Fourth Amendment in the absence of either a warrant or probable cause. Moreover, the

Eighth Circuit in *McDonnell v. Hunter*, 809 F.2d 1302 (1987); and the Third Circuit in *Shoemaker v. Handel*, 795 F.2d 1136, cert. denied, 479 U.S. 986 (1986).

Court has explained, although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976) (footnote omitted). Thus, the Court has on several occasions identified exceptions to the requirement of particularized suspicion "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field" ' " (*New Jersey v. T.L.O.*, 469 U.S. at 342 n.8 (citations omitted)). We believe that the balance of competing interests here strongly supports the constitutionality of the FRA regulations—even though they generally require no showing of particularized suspicion of alcohol or drug use by railroad employees.

B. The FRA regulations entail only the most minimal intrusion on employees' reasonable expectations of privacy. Three features of the regulations account for that fact.

First and foremost, the testing mandated and authorized by the FRA regulations takes place as an aspect of an ongoing employment relationship. As this Court explained in *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), slip op. 7, "[t]he employee's expectation of privacy must be assessed in the context of the employment relation." This point gathers special force where employees work in an industry subject to extensive public and private regulation. Here, the heavily regulated nature of the railroad industry means that railroad employees' ordinary expectations of privacy have been significantly diminished, wholly apart from the impact of the FRA regulations.

Second, the FRA regulations tightly cabin administrative discretion. Under the testing procedures, railroad officials lack any significant discretion in deciding who to test, when to test, or how to conduct the tests. As Judge Alarcon noted in dissent below, the " 'time, place, and scope' " of the testing are thus "brought within reasonable bounds" (Pet. App. 41a (citations omitted)).

Third, the FRA testing procedures themselves are narrowly tailored to respect, to the fullest extent practicable, the employees' reasonable expectations of privacy. Blood testing is mandated after only the most serious accidents and incidents, and blood and urine samples may be collected only at a medical facility, at the direction of medical personnel. The testing procedures are highly reliable; safeguards must be followed to ensure accurate results; and participating laboratories must meet exacting quality assurance standards. While the process of providing samples at a medical facility may impose a measure of inconvenience for some employees, there is no warrant for the court of appeals' suggestion (Pet. App. 22a) that blood, urine, and breath tests are "degrading" or "offen[sive to] human dignity."

C. While the intrusion on privacy is minimal, the governmental interests at stake are substantial. The FRA has a surpassing interest in ensuring that train travel is safe for the riding public and for operating employees, and that accidents capable of releasing hazardous materials into the atmosphere do not occur. As Judge Alarcon correctly observed (Pet. App. 46a), "locomotives in the hands of drug or alcohol impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands." After carefully considering the dimensions of the problem, and after analyzing but rejecting alternative solutions, the FRA determined that blood, urine, and breath testing would help deter alcohol and drug abuse and would assist in ascertaining the causes of significant accidents and incidents. The court of appeals had no basis, in law or in fact, for second-guessing that judgment.

ARGUMENT

THE FRA REGULATIONS ARE CONSTITUTIONAL UNDER THE FOURTH AMENDMENT

A. A Warrantless Search May Be Valid Even In The Absence Of Particularized Suspicion

1. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey v.*

T.L.O., 469 U.S. 325, 340 (1985). See *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). Thus, the Fourth Amendment "does not denounce all searches or seizures, but only such as are unreasonable." *Carroll v. United States*, 267 U.S. 132, 147 (1925). The test of reasonableness, moreover, "is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Rather, in defining the contours of the right to be free from unreasonable searches and seizures, this Court has repeatedly said that " 'the specific content and incidents of this right must be shaped by the context in which it is asserted.' " *Wyman v. James*, 400 U.S. 309, 318 (1971) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). See also *New Jersey v. T.L.O.*, 469 U.S. at 337 ("what is reasonable depends on the context within which a search takes place").

The Court has adopted a balancing test to govern this inquiry. "The permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (quoting *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)). See also *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Camara v. Municipal Court*, 387 U.S. 523 (1967). This approach recognizes that not every invasion of privacy is prohibited by the Fourth Amendment, but only "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard" (*New Jersey v. T.L.O.*, 469 U.S. at 341).

In examining the competing interests, the Court has often found a third consideration important—the amount of discretion left to officials in carrying out the search. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 601-604 (1981); *Delaware v.*

Prouse, 440 U.S. at 654, 661; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). See also *Colorado v. Bertine*, 479 U.S. 367, 376-377 (1987) (Blackmun, J., concurring). Because this constraint on discretion derives from the constitutional requirement of "reasonableness" (*Delaware v. Prouse*, 440 U.S. at 654), the means needed to confine discretion also necessarily vary from context to context. What is required to meet the constitutional concern for controlling discretion depends on the strength of the governmental interest in a particular search practice and the impairment of privacy interests that the practice effects.

2. Applying this balancing test, the Court has held that in the context of an ordinary investigation of criminal conduct by law enforcement officers, both probable cause and a warrant are generally necessary to render a search reasonable. See *United States v. Karo*, 468 U.S. 705, 717 (1984); *United States v. United States District Court*, 407 U.S. 297, 317 (1972). But as the Court explained most recently in *Griffin v. Wisconsin*, No. 86-5324 (June 26, 1987), slip op. 4 (citation omitted)—and as we show in more detail in our brief (at 17-19) in *National Treasury Employees Union v. von Raab*, No. 86-1879²⁵—exceptions from those requirements have been permitted "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " See *New Jersey v. T.L.O.*, 469 U.S. at 340 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring)) ("although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, * * * in certain limited circumstances neither is required' ").

Where, for example, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara v. Municipal Court*, 387 U.S. at 533), the Court has routinely held that a warrant is not required by the Fourth Amendment. See, e.g., *Griffin v. Wisconsin*, slip op. 7; *O'Con-*

²⁵ A copy of the government's brief in *von Raab* has been served on respondents.

nor v. Ortega, No. 85-530 (Mar. 31, 1987), slip op. 11 (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. at 340. The Court has likewise found that the probable cause standard is inappropriate where it would defeat the purposes that the search is designed to achieve. See, e.g., *Griffin v. Wisconsin*, slip op. 9; *New Jersey v. T.L.O.*, 469 U.S. at 340-342.

3. The court below recognized (Pet. App. 16a) "that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant." And it acknowledged (*id.* at 24a) "that accommodation of railroad employees' privacy interest with the significant safety concerns of the government does not require adherence to a probable cause requirement." The court nevertheless insisted (*id.* at 24a-25a) that a blood, urine, or breath test cannot be "justified at its inception" unless there are "reasonable grounds for suspecting that the search will turn up * * * evidence" of on-duty alcohol or drug abuse by an individual employee. To meet that standard, the court of appeals concluded, "particularized suspicion is essential" (*id.* at 25a).

The court of appeals erred, however, in conclusively presuming that the searches at issue here cannot be reasonable under the Fourth Amendment unless there is some individualized suspicion of unlawful conduct. As this Court explained in *United States v. Martinez-Fuerte*, 428 U.S. at 560-561 (footnote omitted), while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion." See also *New Jersey v. T.L.O.*, 469 U.S. at 342 n.8; *Camara v. Municipal Court*, *supra*. For example, the Court has held that individualized suspicion is not required for the Coast Guard or Customs Service to board a vessel and to examine its owner's documents. *United States v. Villamonte-Marquez*, *supra*. Similarly, in *Wyman v. James*, 400 U.S. 309, 318 (1971), the Court upheld the right of a welfare caseworker to enter the home of a welfare recipient to ensure compliance with welfare rules, even though the statute authorizing the home visit required no showing that the recipient was

out of compliance with the rules. And in *United States v. Martinez-Fuerte*, *supra*, the Court held that border officials may stop automobiles at permanent checkpoints without any individualized suspicion.

This Court has also upheld warrantless searches, in the absence of particularized suspicion, in several cases involving "closely regulated" industries. In those cases, the Court has emphasized that the regulated nature of the industry reduces the individual's expectation of privacy, while at the same time affording sufficient notice and regularity to obviate the need for a warrant or particularized suspicion. In *United States v. Biswell*, 406 U.S. 311 (1972), for example, the Court upheld the statutorily-authorized, warrantless search of the locked storeroom of a licensed gun dealer, which resulted in the seizure of unlicensed firearms. The Court explained (*id.* at 316) that inspections under the statute "pose only limited threats to the dealer's justifiable expectations of privacy" since "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." More recently, in *Donovan v. Dewey*, 452 U.S. 594 (1981), the Court upheld provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(a), which authorized warrantless inspections, without particularized suspicion, of underground and surface mines. The Court emphasized that the statute was "specifically tailored" to assure "the certainty and regularity" of the inspection program, and that "the regulation of mines * * * is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he 'will be subject to effective inspection' " (452 U.S. at 603 (footnote and citation omitted)). See also *New York v. Burger*, No. 86-80 (June 19, 1987), slip op. 10 (upholding a state statute permitting warrantless searches of junkyards, in the absence of particularized suspicion).

The court of appeals misread those cases when it *presupposed* that there must be particularized suspicion in order to test railroad employees for the presence of alcohol or drugs. As this

Court made clear in *T.L.O.*, the question whether particularized suspicion is a necessary component of reasonableness depends upon the balance of competing interests; it cannot simply be presumed. In particular, as *T.L.O.* instructs, exceptions may be made to the requirement of individualized suspicion "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field' '" (469 U.S. at 342 n.8 (citations omitted)). The court of appeals glossed over these factors; as Judge Alarcon observed in dissent (Pet. App. 46a), the court of appeals never "engage[d] in the balancing of interests required by the Court." By presuming a requirement of particularized suspicion, the court of appeals spared itself the more rigorous obligation to weigh all of the competing interests.

As we show below, the FRA regulations should be judged by, and easily satisfy, the reasonableness standard under the Fourth Amendment: as in *T.L.O.*, "the privacy interests implicated by [the] search[es] are minimal" and "'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' '" Moreover, the governmental interest in ensuring the safety of the general public (and of railroad employees themselves) is compelling.²⁶

²⁶ Because post-accident testing under Subpart C requires the taking of a blood sample, it must be regarded as a search within the meaning of the Fourth Amendment. See *Schmerber v. California*, 384 U.S. 757, 767 (1966). The breath and urine testing procedures under Subpart D, however, present more complicated questions. Because those procedures merely authorize, but do not require, testing by private railroads (see 50 Fed. Reg. 31551 (1985)), we submit that they do not implicate the Fourth Amendment at all. The "exercise of the choice allowed by * * * law[.] where the initiative comes from [a private party] and not from the State, does not make its action in doing so 'state action' * * *." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) (footnote omitted). See also *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n.10, 164-166 (1978); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841-842 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Rather, "a State normally can be held responsible for a private decision only when it has exercised coercive power or

B. The FRA Regulations Entail A Minimal Intrusion On Employees' Expectation Of Privacy

1. The employment relationship and the regulated nature of the industry

A first and quite general feature of the FRA regulations, which significantly minimizes their interference with expectations of privacy, is the fact that the blood, urine, and breath tests are conducted as an aspect of the employment relationship. As this Court explained in *O'Connor v. Ortega*, slip op. 6 (emphasis in original), "[t]he operational realities of the workplace * * * may make *some* employees' expectations of privacy unreasonable." Thus, "[t]he employee's expectation of privacy must be assessed in the context of the employment relationship"

has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State" (*ibid.*). The court of appeals adduced no such "coercive power" or "significant encouragement" in its analysis of the Subpart D regulations. We recognize that this Court, in *Railway Employees Dep't v. Hanson*, 351 U.S. 225, 232 (1956), held that certain otherwise private conduct was state action because federal law (there, the Railway Labor Act, 45 U.S.C. 152) had preempted state statutes forbidding the private conduct. Here, the FRA promulgated Subpart D in part to preempt state and local rules that might otherwise have prohibited breath and urine testing by private employers (see 49 Fed. Reg. 24294 (1984)). See also 49 C.F.R. 219.13(a). However, for the reasons set out in our brief (at 24-30) in *Communications Workers v. Beck*, No. 86-637, a copy of which has been supplied to respondents, we do not believe that the state-action analysis in *Hanson* should be applied outside its particular context; this Court did not say otherwise in its decision in *Beck*, as it had no occasion to decide the question (see *Communications Workers v. Beck*, No. 86-637 (June 29, 1988), slip op. 24). If the Court concludes that the Subpart D regulations do constitute state action, however, then we believe that those regulations should be regarded as authorizing a search within the meaning of the Fourth Amendment. In our brief in *von Raab* (at 24-25 n.18), we suggested that a urine test required as part of a pre-employment fitness examination, where the employee knows of the test in advance, entails such a minimal interference with any reasonable expectation of privacy that it may not be a search under the Fourth Amendment. The post-accident and post-incident testing authorized by Subpart D, however, does not share those or substantially equivalent features, and thus, assuming it can be regarded as state action, should be considered a Fourth Amendment search.

(*id.* at 7). In the *Ortega* case, for example, the plurality found that the search of an employee's office " 'involve[d] a relatively limited invasion' " of privacy, noting that "the privacy interests of government employees in their place of work * * *, while not insubstantial, are far less than those found at home or in some other contexts" (*id.* at 14).

This proposition has particular force where, as here, the employee works in an industry in which his activities, and those of his employer and co-workers, are subject to extensive public and private regulation. As the Court has explained in similar settings, persons who work in such " 'closely regulated' " industries have a "reduced expectation of privacy" (*New York v. Burger*, slip op. 10) and "in effect consent[] to the restrictions placed upon [them]" (*Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973)).

"Railroads have been subject to comprehensive federal regulation for nearly a century." *United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 687 (1982) (footnote omitted). Beginning in 1893 with the enactment of the Safety Appliance Act, ch. 196, 27 Stat. 531, 45 U.S.C. 1 *et seq.*, the federal government has taken an increasingly active role in regulating railroads in an effort to promote safety. In the early part of this century, Congress enacted, in short succession, the Block Signal Act, ch. 46, 34 Stat. 838, 45 U.S.C. 35, which allowed for research and later required the implementation of automatic signaling systems; the Ash Pan Act, ch. 225, 35 Stat. 476, 45 U.S.C. 17 *et seq.*, repealed by the Federal Railroad Safety Authorization Act of 1982, Pub. L. No. 97-468, Tit. VII, § 705, 96 Stat. 2580, which prohibited the use of locomotives equipped with ash pans that could not be dumped without employees going under the locomotive for that purpose; the Accident Reports Act, ch. 208, § 1, 36 Stat. 350, 45 U.S.C. 38, which established a system for collecting accident data on injuries and fatalities and documenting accident causes; the Locomotive Inspection Act, ch. 103, § 1, 36 Stat. 913, 45 U.S.C. 22, which required railroads to inspect and test locomotives to prevent boiler explosions; and the Signal Inspection Act, ch. 91,

§ 441, 41 Stat. 498, 49 U.S.C. App. 26, which permitted the government to inspect railroad signal systems and, if necessary, to require modifications. More recently, Congress enacted the Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III) 421 *et seq.*, a comprehensive rail safety measure that gives the Secretary of Transportation broad powers to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety" (45 U.S.C. 431(a)).

Acting pursuant to these statutes and others, the FRA has promulgated a substantial volume of regulations, which prescribe the safety obligations of railroads in finer detail. Included among these are regulations prescribing procedures for enforcing the Hazardous Materials Transportation Act (49 U.S.C. App. 1809), 49 C.F.R. Pt. 209; governing railroad noise emissions, 49 C.F.R. Pt. 210; prescribing standards for track safety, 49 C.F.R. Pt. 213, freight car safety, 49 C.F.R. Pt. 215, radio usage, 49 C.F.R. Pt. 220, locomotive safety, 49 C.F.R. Pt. 229, railroad safety appliances, 49 C.F.R. Pt. 231, and railroad power brakes and drawbars, 49 C.F.R. Pt. 232; requiring the filing of railroad operating rules, 49 C.F.R. Pt. 217, reports of accidents and incidents, 49 C.F.R. Pt. 225, and reports of accidents specifically stemming from signal failure, 49 C.F.R. Pt. 233; mandating minimum markings on the tail end of passenger, commuter, and freight trains, 49 C.F.R. Pt. 221; requiring special safety glazing on locomotives, passenger cars, and cabooses, 49 C.F.R. Pt. 223; and prescribing rules governing the installation, inspection, maintenance, and repair of signal and train control systems, devices, and appliances, 49 C.F.R. Pt. 236.²⁷

²⁷ In addition to the expansive scope of federal regulation, the railroad industry has historically been subject to wide-ranging safety regulation by the States, in the exercise of their traditional police powers. As the Court declared more than 100 years ago, "[c]ommon carriers exercise a sort of public office, and have duties to perform in which the public is interested." *Munn v. Illinois*, 94 U.S. 113, 130 (1877). Under that broad conception of the police powers, the Court has upheld a vast array of state railroad regulation. See, e.g., *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R. I. & P. R.R.*, 393 U.S. 129 (1968) (state "full crew" law); *Lehigh Valley R.R. v. Board*

Given the nature of the industry, most safety regulation has focused on railroad equipment, track, and signals. But because "the safety of employees and travelers" does not depend solely on "the enactment of laws relating to mechanical appliances" (*Baltimore & O. R.R. v. ICC*, 221 U.S. 612, 619 (1911)), Congress, the FRA, and various state agencies have also taken steps to regulate the conduct of railroad employees. The Hours of Service Act, ch. 2939, 34 Stat. 1415, 45 U.S.C. 61 *et seq.*, enacted in 1907 and amended several times since then, sets limits on the number of hours that certain railroad operating employees may work, recognizing that "[t]he length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends" (*Baltimore & O.R.R.*, 221 U.S. at 619). See also *Atchison, T. & S.F. Ry. v. United States*, 244 U.S. 336, 342-343 (1917).²⁸ The comprehensive Federal Railroad Safety Act of 1970 also authorizes the regulation of employees, specifically granting the Secretary of Transportation the power to "test/ * * * railroad facilities, equipment, rolling stock, operations, or persons, as he deems necessary to carry out the provisions of this subchapter" (45 U.S.C. 437(a) (emphasis added)). More recently, the Rail Safety Improvement Act of 1988, Pub. L. No.

of Public Utility Comm'rs, 278 U.S. 24 (1928) (state plan requiring railroad to bear large costs for eliminating grade crossing); *Pacific Gas & Elec. Co. v. Police Court*, 251 U.S. 22 (1919) (city ordinance requiring railroad to sprinkle water on surface of street to prevent accumulation of dust); *Great-N. Ry. v. Minnesota*, 246 U.S. 434 (1918) (state decision requiring railroad to build sidewalk where its right-of-way crosses the street); *Seaboard Air Line Ry. v. Railroad Comm'n*, 240 U.S. 324 (1916) (state order requiring railroad to make and maintain a particular track crossing); *St. Louis & S. F. Ry. v. Mathews*, 165 U.S. 1 (1897) (state statute imposing insurer's liability on railroad for damages to property injured by fire from locomotive engines); *Missouri P. Ry. v. Mackey*, 127 U.S. 205 (1888) (state statute imposing liability on railroads for all damage to employees due to negligence of fellow servants).

²⁸ As noted above (page 8, *supra*), the FRA regulations apply to those employees who are subject to the Hours of Service Act (49 C.F.R. 219.5(d) and (e)). Thus, the testing at issue in this case is limited to those employees whose fitness for duty has been a matter of congressional concern for more than 80 years.

100-342, 102 Stat. 624, has amended the existing federal rail safety statutes to extend to individuals (including employees) liability for particular safety infractions that had previously been imposed only on the railroads. See H.R. Rep. 100-637, 100th Cong., 2d Sess. 2, 20 (1988). And numerous federal regulations also bear directly on the daily activities of railroad employees. See, e.g., 49 C.F.R. 218.1 to 218.30 (requiring workmen to follow certain prescribed safety procedures when co-workers are engaged on rail tracks); *id.* § 218.37 (requiring crew members to take certain precautionary measures when a train is moving at a reduced speed); *id.* § 220.61 (requiring employees to follow certain procedures in transmitting train orders by radio). See also, e.g., Mass. Ann. Laws ch. 160, §§ 178-181 (Law. Co-op. 1979) (setting eyesight and experience requirements for railroad engineers and conductors).

In addition to government regulation, employees' conduct is also closely regulated by the private railroads themselves. See *O'Connor v. Ortega*, slip op. 6. Operating Rule G has for decades prohibited the on-duty use or possession of alcohol or drugs by railroad employees. The railroads have also taken steps to enforce that rule through supervision and discipline (see pages 2 & note 1, 5, *supra*), and in some cases through the use of "sniffer" dogs and toxicological testing similar to the FRA procedures. See *Brotherhood of Locomotive Engineers v. Burlington N. R.R.*, 838 F.2d 1087, 1089 (9th Cir. 1988); *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 702-703 (7th Cir. 1987). As required by federal regulation, railroads also train employees on safety rules and periodically test their proficiency in complying with those rules. See 49 C.F.R. 217.9, 217.11. Moreover, the railroads have historically imposed exacting physical requirements for employment in particular posts, including periodic physical exams that typically involve taking blood and urine samples. See *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d at 702.²⁹

²⁹ The court of appeals acknowledged (Pet. App. 21a) that the railroad industry has a practice of imposing health and fitness requirements, but it discounted that consideration because, as the court put it, fitness requirements

In short, railroad employees are an integral part of an industry that is pervasively regulated, both by the government and by the railroads themselves, all in the service of safe rail passage. As Judge Alarcon correctly concluded (Pet. App. 38a-39a), that regulatory presence significantly diminishes employees' reasonable expectation of privacy.³⁰ For precisely those reasons, two courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced employees' expectations of privacy. See *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant engineers); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (race track employees).³¹

"have been matters of private negotiation between railroads and employees not matters of federal regulation." But in assessing an employee's expectation of privacy, it should not matter that it is the employer, rather than the government, that constricts the realm of otherwise private conduct. The "expectations of [privacy of] employees in the private sector * * * may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor v. Ortega*, slip op. 6.

³⁰ The court of appeals recognized that "the railroad industry has experienced a long history of close regulation" (Pet. App. 19a). It nevertheless found that factor unpersuasive, because "the vast bulk of safety legislation is directed at owners and managers of railroads, not their employees" and thus the court did not believe that federal regulation "has diminished the individual railroad employee's expectation of privacy in his person or his body fluids" (*ibid.* (emphasis in original)). It is not surprising, however, that in a capital intensive industry like railroading, the "bulk" of safety regulations would relate to the fixed facilities and equipment, not to personnel. But as this Court explained in *New York v. Burger*, slip op. 13 n.16, "the sheer quantity of pages of statutory material is not dispositive of this question." Rather, the issue is whether a railroad employee, engaged in a business already subject to far-reaching regulation, could reasonably find it intrusive when his employer—or his employer acting at the government's behest—requires a modest toxicological test in the further service of railroad safety.

³¹ The court of appeals distinguished the *Shoemaker* case, in part because the court concluded (Pet. App. 21a) that the Secretary of Transportation, unlike the Racing Commission in *Shoemaker*, lacked the authority to prescribe qualification standards for railroad employees. In fact, however, the very provision on which the court relied in drawing that conclusion expressly excepts

2. The constraints on official discretion

This Court has explained that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions * * *'" (*Delaware v. Prouse*, 440 U.S. at 653-654 (footnote and citations omitted)).³² Thus, as the Court stated in *Prouse*, "[i]n those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field'" (*id.* at 654-655 (footnote omitted), quoting *Camara v. Municipal Court*, 387 U.S. at 532). Or, as the Court put the matter in its most recent decision concerning a "closely regulated" industry, the regulation must advise the individual "that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers" (*New York v. Burger*, slip op. 11). See also *New Jersey v. T.L.O.*, 469 U.S. at 342 n.8.

The post-accident testing procedures in Subpart C easily satisfy that standard. Under those procedures, every covered employee who is directly involved in one of the three triggering events is automatically subject to blood and urine tests. The railroads have virtually no discretion in that regard. Except in those cases of "impact accidents" or "fatal train incidents" in which the railroad "can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident" (49 C.F.R. 219.203(a)(3)(i)), the railroad may not carve out exceptions, nor may it select particular employees, but not others, to test (*id.* § 219.203(a)(2)). Moreover, as Judge Alarcon observed (Pet. App. 41a), the "time, place,

from the stated limitation "such qualifications as are specifically related to safety." 45 U.S.C. 431(a).

³² See also *United States v. Ortiz*, 422 U.S. 891, 895-896 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975).

and scope" of the testing is limited. See *New York v. Burger*, slip op. 19; *United States v. Biswell*, 406 U.S. at 315. The tests must be performed "as soon as possible after the accident or incident" (49 C.F.R. 219.203(b)(1)), and they may only be conducted at "an independent medical facility" by qualified medical personnel (*id.* § 219.203(c)(1)). Moreover, consistent with its overall purpose (see *id.* § 219.1), the regulations permit testing to determine only the use of alcohol or drugs; no other kinds of tests are permitted.

Subpart D of the regulations, authorizing (but not requiring) breath and urine testing for cause, also tightly confines the railroads' discretion.³³ Section 219.301(b)(3), which authorizes breath tests for employees who have been directly involved in specified operating rule violations or errors, and 49 C.F.R. 219.301(c)(1), which, in part, authorizes urine testing under identical circumstances, apply to all "covered employees" (*id.* § 219.301(a)), permit tests to be conducted only within the first 8 hours following the violation or error in question (*id.* § 219.301(f)), and limit the tests to the specified violations.³⁴ Similarly, Section 219.301(b)(2), which authorizes breath tests for employees who have been involved in certain reportable accidents or incidents, and Section 219.301(c)(1), which, in part, authorizes urine testing under identical circumstances, likewise apply to all "covered employees" (49 C.F.R. 219.301(a)), permit tests to be conducted only within the first 8 hours following the accident or incident (*id.* § 219.301(f)), and limit the testing to specified accidents or incidents. And while there is an element of discretion under Section 219.301(b)(2) and (c)(1)—in that a supervisor must determine that there is a reasonable basis to

³³ The court of appeals upheld (Pet. App. 26a-27a) two provisions in Subpart D—49 C.F.R. 219.301(b)(1) and (c)(2)—which authorize, respectively, breath and urine tests upon a finding of reasonable suspicion of drug or alcohol impairment. We therefore do not discuss those provisions in this section.

³⁴ Moreover, in selecting the particular safety rule violations that would trigger authorized testing, the FRA selected only those violations that "involve[] the potential for a serious train accident or grave personal injury, or both." 50 Fed. Reg. 31553 (1985).

suspect that the employee's actions may have contributed to the occurrence or severity of the event—that discretion is modest indeed. Unlike the authority to search conferred in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), which "devolve[d] almost unbridled discretion upon executive and administrative officers" (*id.* at 323), 49 C.F.R. 219.301(b)(2) and (c)(1) require the employer to perform the familiar, and routine, task of assessing the nature of the occurrence and determining, in light of the objective circumstances, whether human error played a part. There is nothing "random, infrequent, or unpredictable" (*Donovan v. Dewey*, 452 U.S. at 599) about that judgment.

3. The narrowly-tailored nature of the testing procedures

Finally, the actual testing procedures adopted by the FRA are narrowly tailored to respect employees' reasonable expectations of privacy. Indeed, the court of appeals agreed that "[t]he manner of conducting the tests is generally reasonable," noting, in particular, that "[t]he intrusiveness of the process of urine testing has been reduced as much as is practicable" (Pet. App. 29a).

Under Subpart C, the employer must transport the employee after the accident to "an independent medical facility" where the blood and urine samples will be taken by qualified medical personnel (49 C.F.R. 219.203(c)(1)). The samples, once taken, must be handled in a specified manner (*id.* § 219.205(a)) and must thereafter be shipped to the FRA laboratory for analysis (*id.* § 219.205(d)). The laboratory employs "state-of-the-art equipment and techniques to detect and quantify alcohol and drugs" (*Field Manual* B-12), including an initial screening test for drugs and a confirmatory GC/MS test in the event of a positive finding (*ibid.*; see also 50 Fed. Reg. 31555-31556 (1985)). Once the analysis is completed, the FRA notifies the employee of the result and offers him an opportunity to respond in writing prior to the preparation of a final investigative report (49 C.F.R. 219.211(a)(2)). And an employee who refuses to provide a sample is entitled to an elaborate hearing before any disciplinary action may be taken (*id.* § 219.213).

The procedures for authorized breath and urine testing under Subpart D are also carefully crafted to respect the privacy of railroad employees. Only certain designated breath-test devices may be used; the devices must be properly maintained; and the tests must be conducted by qualified personnel (49 C.F.R. 219.303(a)(1), (2), and (3)). If an initial breath test is positive, it must be confirmed at least 15 minutes later (*id.* § 219.303(a)(5)). Urine may be collected only at an independent medical facility and the collection must be supervised by personnel of that facility (*id.* § 219.305(a)). The medical facility must adopt and follow procedures to ensure positive identification of each sample and accurate reporting of laboratory results (*id.* § 219.305(b)). Only an independent laboratory "proficient in the testing of urine for alcohol and drugs of abuse" may perform the actual testing (*id.* § 219.307(a)(1)), and the regulations require the laboratories to use rigorous testing methods sufficient to ensure accurate results (*id.* § 219.307(b)). Finally, whenever the results of either breath or urine tests are intended for use in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent laboratory (*id.* §§ 219.303(c), 219.305(d)).

The FRA regulations are thus as responsive as practicable to the privacy interests of employees. Indeed, recognizing that "[b]reath and body fluid testing techniques involve varying degrees of perceived 'intrusiveness,'" (49 Fed. Reg. 24276 (1984)), and noting its own "continuing concern over the utility and reasonableness of the post-accident testing program," the agency "substantially reduced the number of events and redefined the types of events that will trigger the requirement of testing" under Subpart C (50 Fed. Reg. 31542 (1985)).³⁵ The

³⁵ In response to critical comments, the agency, among other things, raised the threshold of property damage from \$150,000 to \$500,000, concluding that a lower threshold would have required testing in many cases that do not involve alcohol or drug abuse (50 Fed. Reg. 31542 (1985)). It also adopted a "scaled-down" requirement of testing after an on-duty fatality, electing not to

FRA also tailored the post-accident testing to respect the medical needs of passengers and employees who may be injured in an accident or incident (49 C.F.R. 219.203(b)(2), 219.203(e)). Moreover, in deciding under Subpart D to authorize breath and urine, but not blood, testing, the agency noted that "drawing blood is invasive" in ways that the other two tests are not (50 Fed. Reg. 31556 (1985)). In these and other ways, the agency carefully designed the testing procedures "to assure appropriate regulatory balance" (49 Fed. Reg. 24276 (1984)).³⁶

We acknowledge that, despite these limitations, some employees may experience some inconvenience in being transported to a medical center for testing or may feel self-conscious about the actual collection process. But we reject as unwarranted the court of appeals' apparent belief (Pet. App. 22a-23a) that blood, urine, and breath testing are substantially intrusive procedures.³⁷ As this Court observed in *Schmerber v. California*, 384 U.S. 757, 771 n.13 (1966) (citation omitted), " '[t]he blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.' " See also *Winston v. Lee*, 470 U.S. 753, 761-762 & n.5 (1985). Urine and breath tests are

require testing after any loss of eye or limb because to do so would encompass many cases in which the injury happened "somewhat unpredictably" (*id.* at 31543). In addition, the FRA limited testing after "impact accidents" to instances in which there is either a reportable injury or damage of at least \$50,000. The agency acknowledged that impact accidents usually result from "human performance failures," but it nevertheless restricted the scope of this triggering event because it "recognize[d] that burdens on employees and the railroads should be subject to reasonable limitations" (*ibid.*).

³⁶ What is more, Subpart E of the regulations, which is not at issue in this case, affords employees that have a substance abuse problem an opportunity to obtain counseling and rehabilitation before a positive test result will lead to disciplinary action.

³⁷ Indeed, the court of appeals suggested (Pet. App. 22a) that urinalysis is as "degrading" and "offen[sive to] human dignity" as body cavity searches.

still less intrusive, since neither requires an actual invasion of the body surface, and both involve a natural bodily function, routinely (and necessarily) conducted many times during the normal work day. Cf. *Mackey v. Montrym*, 443 U.S. 1, 19 (1979) (a breath test "provides the most reliable form of evidence of intoxication for use in subsequent proceedings").

Moreover, under the FRA regulations all blood and urine samples must be collected by medical personnel at medical facilities (49 C.F.R. 219.203(c)(1), 219.305(a)). Thus, as in *Schmerber*, the collection process is conducted "in a hospital environment according to accepted medical practices" (*Schmerber*, 384 U.S. at 771), and in that critical respect it is not materially different from any number of medical and physical examinations required by employers in the public and private sectors—including the railroad industry—as a condition of employment. The courts have approved such tests when imposed as a reasonable condition of employment. See, e.g., *McDonnell v. Hunter*, 612 F. Supp. 1122, 1130 n.6 (S.D. Iowa 1985), *aff'd*, 809 F.2d 1302 (8th Cir. 1987). Cf. *Bratcher v. United States*, 149 F.2d 742, 745-746 (4th Cir.), *cert. denied*, 325 U.S. 885 (1945).

C. The FRA Regulations Serve Compelling Governmental Interests

1. As respondents acknowledged below (Br. 29) and as the court of appeals recognized (Pet. App. 24a), the government has a surpassing interest in ensuring the safety of the general public and operating employees by preventing alcohol and drug impairment aboard the nation's railroads. Railroad safety and measures to secure it, as we noted above (pages 26-27, *supra*), have been a preoccupying concern of Congress since the turn of the century. "The first of the Safety Appliance Acts dates back to 1893, the Signal Inspection Act and the Accident Reports Act to 1910, the Hours of Service Act to 1907, and the Locomotive Inspection Act to 1911." H.R. Rep. 91-1194, 91st Cong., 2d Sess. 8 (1970). More recently, recognizing the enormous risks involved in the industry—including the "transportation of a

variety of volatile, highly toxic, and sometimes frightening hazardous materials" (*id.* at 9)—Congress enacted the comprehensive Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III) 421 *et seq.*, endowing the Secretary of Transportation with broad powers to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety" (45 U.S.C. 431(a)), including, without limitation, the power to "test[] * * * railroad facilities, equipment, rolling stock, operations, or persons, as he deems necessary to carry out the provisions of this subchapter" (45 U.S.C. 437(a)).¹⁸

Acting pursuant to that broad authority (see 48 Fed. Reg. 30723 (1983)), the FRA promulgated regulations designed "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" (49 C.F.R. 219.1(a)). In doing so, the agency meticulously documented the safety issues that prompted its concern. "It is clear," the FRA concluded from the voluminous administrative record before it (50 Fed. Reg. 31514 (1985)), "that alcohol and drug use is sufficiently common to pose a significant safety problem." The evidence, much of which is summarized in the preamble to

¹⁸ More generally, this Court's cases confirm the government's compelling interest in assuring the safety of the nation's transportation systems. See, e.g., *Brock v. Roadway Express, Inc.*, No. 85-1530 (Apr. 22, 1987) (plurality opinion), slip op. 8 ("accepting as substantial the Government's interest in promoting highway safety"); *South Dakota v. Dole*, No. 86-260 (June 23, 1987), slip op. 5; *New York v. Class*, 475 U.S. 106, 118 (1986) ("governmental interest in highway safety * * * is of the first order"); *Mackey v. Montrym*, 443 U.S. 1, 17 (1979) (describing "the paramount interest * * * in preserving the safety of [the] public highways"); *New York Transit Authority v. Beazer*, 400 U.S. 568, 591 (1979) (footnote omitted) ("the 'no drugs' policy now enforced by [the Transit Authority] is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists"); *Atchison, T. & S. F. Ry. v. United States*, 244 U.S. 336, 342-343 (1917) (describing the Hours of Service Act, which placed a ceiling on the number of consecutive hours that railroad employees could work, as "essential to public and private welfare"); *Missouri P. Ry. v. Mackey*, 127 U.S. 205, 210 (1888) ("the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees, as well as the safety of the public").

the regulations, revealed case after case in which alcohol and drug abuse by railroad employees had caused massive property damage, injuries and fatalities, or the release of hazardous materials. See pages 2-7, *supra*. And there is every reason to believe that "use of alcohol and drugs continues to play a causal role in some of the most serious rail accidents" (J.A. 188).³⁹

The FRA concluded that alcohol and drug testing would reduce these tragic incidents, primarily in two ways. First, it explained (50 Fed. Reg. 31541 (1985)), testing would "help to deter employees from using alcohol and drugs on the job." While the agency recognized "that many substance-dependent employees are unlikely to be deterred from bringing their problems to work," it found that "at least half of the alcohol and drug-impaired employees involved in accidents and injuries on the railroads become impaired volitionally" (*ibid.*). "The disciplinary actions that will result from this program will be vivid examples to other employees who may be tempted to bring alcohol or drugs onto the railroad" (*ibid.*).⁴⁰

Second, the FRA determined that a program of mandatory post-accident alcohol and drug testing would permit the agency

³⁹ Perhaps the most notable of these recent accidents is the January 4, 1987 collision between an Amtrak passenger train and three Conrail locomotives at Chase, Maryland. In that accident, sixteen persons died and another 174 were injured. "Post-accident test results showed that the engineer and brakeman of the Conrail locomotives—who failed to observe signal indications and ran through a switch into the path of the high-speed Amtrak train—had marijuana metabolites in their blood and urine after the accident. (The brakeman also tested positive for PCP in the urine.)" J.A. 188. The NTSB concluded that "the leading contributing cause of this accident was the Conrail engineer's impairment by marijuana" (*ibid.*).

⁴⁰ There is good reason to believe that the FRA post-accident testing program has begun to achieve some of its desired deterrent effects. From February 10, 1986, through December 31, 1987, 349 events occurred that qualified for post-accident testing. Of the employees tested pursuant to Subpart C, a total of 88 (or 5.8%) tested positive for either alcohol or drugs. Although the comparison is somewhat inexact, that figure compares favorably to the 16% positive rate found in the seven-year period prior to the issuance of the regulations for employees killed in railroad accidents and incidents. J.A. 187.

"to determine with greater precision the causes of major accidents of interest to the public" (50 Fed. Reg. 31541 (1985)), and thereby to take further measures to safeguard the general public. "Enlightened and proportional regulation," the agency explained (*ibid.*), "will only be possible if the true causes of major human factor accidents are known." In the past, as the National Transportation Safety Board has reported (J.A. 131), the "[i]nvestigation of accidents has been hampered because toxicological tests for alcohol-drug use [were] not made after serious railroad accidents when the employees responsible for the operation of the train [were] not fatally injured." The FRA's post-accident testing program should help to cure that deficiency: the agency concluded (50 Fed. Reg. 31541 (1985)) that data derived from post-accident testing "may indicate the need for further alcohol and drug countermeasures" and also "provide guidance on the need for more generalized measures designed to maintain train separation, better train handling or safer yard operations." ⁴¹

Finally, we note that the FRA adopted the alcohol and drug testing regulations only after it had first examined alternative approaches and found them wanting. See pages 5-6 & note 6, *supra*. While we do not believe that the FRA's consideration of less intrusive alternatives was constitutionally required,⁴² the agency's comprehensive analysis of its options reflects the essential reasonableness of the choices that it made.

2. The court of appeals did not quarrel with the importance of the governmental interests in this case (see Pet. App. 7a), but it discerned a "flaw in the reasonableness of th[e] [FRA's] approach to the problem" (*id.* at 28a). In particular, the court stated (*ibid.*), "[b]lood and urine tests intended to establish drug

⁴¹ Joseph W. Walsh, Associate Administrator for Safety for the FRA, has stated that in the absence of post-accident testing, government officials would not have been able to determine the cause of the Chase, Maryland collision. J.A. 189.

⁴² As we explain at greater length in our brief in the *von Raab* case (86-1879 Br. 39), "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983).

use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment." Accordingly, it concluded (*id.* at 29a), "[r]equiring individualized suspicion would help to alleviate some of the harsh consequences of exclusive reliance on test results." In so reasoning, the court erred in three respects.

First, we do not accept the court's premise that urine testing is irrelevant to a determination of current drug intoxication. The FRA noted that urine tests do "indicate whether the person in question is using one or more controlled substances," and it observed that "[t]he drug abuser is * * * a member of a population that presents a higher risk to safety than those who are not members of that population." 50 Fed. Reg. 31556 (1985). While that information, standing alone, will not dispositively prove on-the-job impairment, it is nonetheless material information that a railroad is entitled to learn. The FRA accordingly explained that any results from a urine test must be "taken with specific information on the pattern of elimination for the particular drug and other information on the behavior of the employee and the circumstances of the accident" before a judgment can be reached as to how a particular accident occurred (49 Fed. Reg. 24291 (1984)).

Second and relatedly, the court of appeals ignored the fact that in each case urine testing will be accompanied by blood testing or the opportunity for a blood test. See 49 C.F.R. 219.203(a), 219.305(d).⁴³ After examining the literature in the field and entertaining extensive comments from the public, the FRA concluded (49 Fed. Reg. 24291 (1984)) that a blood sample "can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects." As scientists from the National Institute on Drug Abuse testified

⁴³ There may be instances in which, due to the nature of the particular accident, "the interval between the accident and time blood is drawn may be greater than the time required for certain drugs to be eliminated from the blood." 49 Fed. Reg. 24291 (1984). In such cases, a urine test may provide more useful data.

during the FRA regulatory proceedings, "[a]lthough urine screening technology is extremely effective in determining drug use, * * * [i]f company policies are tied to performance impairment, or use on the job, then blood would be the body-fluid to assay, since it is generally scientifically accepted that presence of drug in blood indicates very recent use" (J.A. 63 (statement of Richard A. Lindblad and J. Michael Walsh)). The sources relied upon by the court of appeals (Pet. App. 28a) do not say otherwise, since they criticized only the capability of *urine* testing, and did not contradict the FRA's conclusions about *blood* testing.⁴⁴

Finally, the court of appeals' qualms about urine testing do not take into account the fact that the FRA regulations are designed not simply to *discern* on-the-job alcohol and drug use or impairment; they are also intended to *deter* such use or impairment, by discouraging employees from using alcohol and drugs at a time close enough to their shifts that they may remain

⁴⁴ For example, in *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), one of the sources relied upon by the court of appeals, the D.C. Circuit considered the constitutionality of a urinalysis program for District of Columbia bus drivers. At the page cited by the court below, the D.C. Circuit explained that the immunoassay screening test employed by the District was inadequate because it could not show on-duty impairment. The D.C. Circuit did not, however, consider the sufficiency of any more precise urinalysis methodology, nor did it have before it a testing program, like the FRA program, that relies on blood as well as urine samples. The other sources cited by the court of appeals are equally unhelpful. While Dr. Dubowski did state, at the pages cited by the court below, that urine testing cannot discern present drug impairment, he also explained elsewhere in his article that "[b]ecause the blood stream is the primary pathway for drug distribution throughout the body, presence of a drug in the blood or its components usually signifies recent intake into the body, particularly when it is found in relatively high concentration and in the form of the parent drug rather than as its metabolites or biotransformation products." Dubowski, *Drug-Use Testing: Scientific Perspectives*, 11 *Nova L. Rev.* 415, 427 (1987). The article written by Karen Hudner, as its title suggests, likewise dealt only with urine testing, and not with blood testing. Hudner, *Urine Testing for Drugs*, 11 *Nova L. Rev.* 553 (1987). The same is true of the remaining article, authored by Paul Joseph. Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 *Nova L. Rev.* 605, 632 & nn. 91-93 (1987).

impaired when they go on duty. See 50 Fed. Reg. 31541 (1985). Whatever its limitations as a means of discerning on-duty drug use or impairment, urine testing provides a powerful deterrent to the use of drugs by railroad employees who are about to begin a shift.⁴⁵

3. The court of appeals also surmised (Pet. App. 26a) that it would "pose[] no insuperable burden on the government to require individualized suspicion." It noted (*ibid.*) that a reasonable suspicion standard is already codified as part of Subpart D (49 C.F.R. 219.301(b)(1) and (c)(2)), and it concluded that the same standard "should be incorporated into the mandatory testing provisions set out in 49 C.F.R. § 219.201 and the other authorized testing provisions set out in 49 C.F.R. § 219.301(b)(2) and (3)" (Pet. App. 26a-27a).

This analysis is flawed at every turn. First and foremost, a requirement of individualized suspicion would effectively preclude testing in the large number of cases in which alcohol and drug abusers betray no outward signs of impairment. As the FRA determined (50 Fed. Reg. 31526 (1985)), "in a significant proportion of cases—probably a clear majority of the cases involving violations of th[e] final rule—there may be no external signs detectable by the lay person or, in many cases, even the physician." In particular, "research indicates that social drinkers, bartenders, and even some police officers cannot accurately judge levels of intoxication" (*ibid.* (citing evidence)). And the FRA found (*id.* at 31527) that "[i]f detection of alcohol use is difficult, detecting the use of the wide variety of controlled substances presents a challenge that is even more formidable. Many drugs of abuse produce effects much more

⁴⁵ We note that blood testing is appropriate where, as here, one central purpose of testing employees is to determine whether drug or alcohol use was the cause of a particular accident. On the other hand, where, as in cases such as the program adopted by the Customs Service in *National Treasury Employees Union v. von Raab*, No. 86-1879, employee testing is designed to determine whether an employee is a drug user, and thus whether he presents a significant risk to safety or security, blood testing would be less useful than urine testing, since drug residues generally pass out of the blood only a few hours after use, while they remain in the urine for longer periods. See 49 Fed. Reg. 24291 (1984).

subtle or complex (and sometimes more pernicious) than alcohol" and "most drug abusers will be careful to control their demeanor when there is a threat of detection." See also J.A. 60 (NIDA testimony), 179.

Second, a regulation that permits testing only upon a finding of particularized suspicion would be wholly dependent on the ability and willingness of supervisors and operating employees to observe their co-workers and demand that abusers undergo the required tests. The FRA found very little reason to rely on such voluntary compliance. Rather, the agency determined that there was a "conspiracy of silence" among railroad employees concerning alcohol and drug use (49 Fed. Reg. 24281 (1984)). In addition, it found that "[t]he threat of being held liable in tort to employees and/or members of the public creates powerful disincentives for railroads either to explore the possible involvement of alcohol or drugs in the course of their own investigations or to report, as alcohol or drug-related, accidents for which other explanations are (or appear to be) sufficient" (48 Fed. Reg. 30726 (1983)). And much railroad work involves the use of small crews, operating over great distances, without the opportunity for sustained observation by peers and supervisors.

Third, a particularized suspicion standard is flatly inconsistent with one of the FRA's principal objectives in requiring post-accident testing: to determine, with greater reliability and consistency, the causes of significant accidents and incidents (see 50 Fed. Reg. 31541 (1985)). As the FRA explained (*ibid.*), "[e]nlightened and proportional regulation will only be possible if the true causes of major human factor accidents are known." Under the court of appeals' standard, however, the agency could not require testing—even after a major accident, involving fatalities and massive property damage—unless, in addition to the accident itself, an employee showed individualized signs of impairment.

Finally, as in *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976), imposing a requirement of particularized suspicion would reduce the deterrent effect of the alcohol and drug-testing regulations, by permitting abusers to persist in their habit until sufficient evidence accumulates against them. See

J.A. 190. If the nation's railroads must await palpable evidence of on-duty impairment before they may intervene, the result could be an incalculable sacrifice of safety to employees and the public. As Judge Alarcon observed (Pet. App. 38a), "[a]n idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." In view of the minimally intrusive nature of the FRA regulations, and the surpassing importance of their objectives, there is no basis for requiring the railroad industry, and the general public, to absorb such costs.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

JAMES M. SPEARS
ROBERT J. CYNKAR
Deputy Assistant Attorneys General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHAITMAN
MARC RICHMAN
Attorneys

B. WAYNE VANCE
*General Counsel
Department of
Transportation*

S. MARK LINDSEY
Chief Counsel

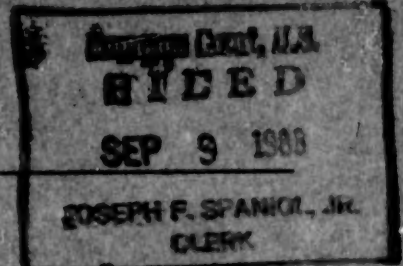
GREGORY B. MCBRIDE
Assistant Chief Counsel

DANIEL CAREY SMITH
*Deputy Assistant
Chief Counsel
Federal Railroad
Administration*

JULY 1988

(16)

No. 87-1555



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

**JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF
TRANSPORTATION, et al.,**
v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE RESPONDENTS

Of Counsel:

HAROLD A. ROSS
General Counsel
Brotherhood of Locomotive
Engineers
The Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

Clinton J. Miller, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

LAWRENCE M. MANN*
Alper & Mann
Suite 811
400 First Street, N.W.
Washington, D.C. 20001
(202) 298-9191

W. DAVID HOLSBERY
Davis, Cowell & Bowe
100 Van Ness Avenue
San Francisco, CA 94102
(415) 626-1880

*Attorneys for Respondents
Railway Labor Executives'
Association*

**Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	11
The FRA Regulations Are Unconstitutional Under The Fourth Amendment	11
A. The Drug and Alcohol Testing Mandated And Authorized By 49 C.F.R. Part 219 Constitutes A Search And Seizure Within The Meaning Of The Fourth Amendment ..	11
B. The Fourth Amendment Requires Particularized Suspicion Before Railroad Workers May Be Tested For Drug Or Alcohol Impairment	15
1. The Appropriate Standard Of Reason- ableness	15
2. Application Of The Twofold Inquiry To The Facts In This Case	17
C. The Significant Privacy Interests Of Railroad Workers And The Wide Discretion Afforded Railroad Officials Render Any Exception To Particularized Suspicion Inappropriate	21
1. Railroad Employees' Privacy Interests Are Not Minimal	21

TABLE OF CONTENTS—Continued

Page

2. The Closely-Regulated Industry Exception To Particularized Sus- picion Is Inapplicable To Drug And Alcohol Testing Of Railroad Workers Under The FRA Regulations	28
3. There Are Inadequate Safeguards Available To Assure That The Railroad Employees' Reasonable Expectations Of Privacy Are Not Subject To The Discretion Of The Official In The Field	33
D. The FRA Regulations Do Not Serve Compelling Governmental Interests	35
1. The Regulations Will Not Result In Any Greater Deterrence	36
2. Obtaining Better Data Concerning Causes Of Accidents Does Not Justify Invasive Testing	37
3. The Regulations Must Be More Narrowly Drawn Because Drug And Alcohol Testing Infringes Upon Fundamental Constitutional Rights	38
E. The Implied Consent Specified In 49 C.F.R. § 219.11 Cannot Validate An Otherwise Unreasonable Search	43
CONCLUSION	45
ADDENDUM	1a

TABLE OF AUTHORITIES

Cases:

Page

<i>Balelo v. Baldrige</i> , 724 F.2d 753 (9th Cir.) (<i>en banc.</i>), <i>cert. denied</i> , 104 S. Ct. 3536 (1984)	30
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982)	11
<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968)	44
<i>Burnett v. Municipality of Anchorage</i> , 806 F.2d 1447 (9th Cir. 1986)	14
<i>Camara v. Municipal Court</i> , 387 U.S. 523 (1967)	9, 15, 16, 23, 28, 35
<i>Capua v. City of Plainfield</i> , 643 F. Supp. 1507 (D. N.J. 1986)	18, 22, 27
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	15, 16
<i>Colonnade Catering Corp. v. United States</i> , 397 U.S. 72 (1970)	16, 29
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971)	16
<i>Culombe v. Connecticut</i> , 367 U.S. 568 (1961)	44
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	18, 23
<i>Division 241 Amalgamated Transit Union v.</i> <i>Suscy</i> , 538 F.2d 1264 (7th Cir.), <i>cert.</i> <i>denied</i> , 429 U.S. 1029 (1976)	13
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981) ...	16,
	29, 31, 39
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972) ..	38, 40
<i>Everett v. Napper</i> , 833 F.2d 1507 (11th Cir. 1987)	13
<i>Farris v. United States</i> , 24 F.2d 639 (9th Cir.), <i>cert. denied</i> , 277 U.S. 607 (1928)	43
<i>Flagg Bros., Inc. v. Brooks</i> , 436 U.S. 149 (1978)	11

Cases—Continued:	Page
<i>Frost Trucking Co. v. Railroad Commission</i> , 271 U.S. 538 (1926)	43
<i>Garrity v. New Jersey</i> , 385 U.S.493 (1967)	44
<i>Illinois v. Lafayette</i> , 462 U.S.640 (1983)	16, 38
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974)	11
<i>Katz v. United States</i> , 389 U.S.347 (1967)	14, 16, 44
<i>Lovvorn v. City of Chattanooga</i> , 846 F.2d 1539 (6th Cir. 1988)	13, 14, 43
<i>Marshall v. Barlow's, Inc.</i> , 436 U.S. 307 (1978)	14, 29
<i>McDonell v. Hunter</i> , 612 F. Supp. 1122 (S.D. Iowa 1985), <i>aff'd.</i> , 809 F.2d 1302 (8th Cir. 1977)	13, 39, 43
<i>McMorris v. Alioto</i> , 567 F.2d 897 (9th Cir. 1978)	39
<i>Michigan v. Clifford</i> , 446 U.S. 287 (1984)	37
<i>Michigan v. Thomas</i> , 458 U.S. 259 (1982)	16
<i>National Federation of Federal Employees v.</i> <i>Weinberger</i> , 818 F.2d 935 (D.C. Cir. 1987)	7, 13, 43
<i>National Treasury Employees' Union v.</i> <i>Von Raab</i> , 816 F.2d 170 (5th Cir. 1987), <i>cert. granted</i> , 108 S. Ct. 1072 (1988)	13, 22
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985) <i>passim</i>	
<i>New York v. Burger</i> , 107 S. Ct. 2636 (1987)	9, 24, 29, 31, 33, 39
<i>O'Connor v. Ortega</i> , 107 S. Ct. 2636 (1987) (plurality opinion)	16, 26, 36, 39
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937)	40
<i>Patchogue-Medford Congress of Teachers v.</i> <i>Board of Education</i> , 510 N.E.2d 325, 331, 517 N.Y.S.2d 456 (1987)	36
<i>People v. Carlson</i> , 677 P.2d 310 (Colo. 1984)	14, 42
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)	43
<i>Railway Employees' Department v. Hanson</i> , 351 U.S. 225 (1956)	16, 13

Cases—Continued:	Page
<i>Railway Labor Executives' Association v.</i> <i>Burnley</i> , 839 F.2d 575 (9th Cir.), <i>cert.</i> <i>granted</i> , 108 S. Ct. 2033 (1988)	7, 13, 15, 17
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	38, 40
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	6, 11, 22, 30, 37
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973)	10, 16, 44
<i>See v. City of Seattle</i> , 387 U.S. 541 (1967)	29
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1961)	38, 39
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir.) <i>cert. denied</i> , 479 U.S. 986 (1986)	13, 14 16, 31
<i>South Dakota v. Opperman</i> , 428 U.S. 364 (1976)	16, 30
<i>Taylor v. O'Grady</i> , 669 F. Supp. 1422 (N.D. Ill. 1987)	13, 21
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	8, 9, 15, 16, 22, 38, 39
<i>Union Pacific Railway Co. v. Botsford</i> , 141 U.S. 250 (1891)	39
<i>United States v. Biswell</i> , 406 U.S. 311 (1972)	16, 29
<i>United States v. Crowder</i> , 543 F.2d 312 (D.C. Cir. 1976) (<i>en banc</i>), <i>cert. denied</i> , 429 U.S. 1062 (1977)	30
<i>United States v. Davis</i> , 482 F.2d 893 (9th Cir. 1973)	39
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	23
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)	16
<i>United States v. Montoya de Hernandez</i> , 446 U.S. 531 (1980)	38
<i>United States v. Ortiz</i> , 422 U.S. 89 (1975)	16
<i>United States v. Sharpe</i> , 470 U.S. 675 1985)	38
<i>United States v. United States District Court</i> , 407 U.S. 297 (1972)	16
<i>United States v. Watson</i> , 423 U.S. 411 (1976)	16

Cases—Continued:	Page
<i>Warden v. Hayden</i> , 387 U.S. 294 (1967)	16, 38
<i>Weeks v. United States</i> , 232 U.S. 383 (1914)	16
Constitution, Statutes and Regulations:	
U.S. Constitution:	
Amendment IV	<i>passim</i>
Accident Reports Act, 45 U.S.C. § 38	31
Anti-Drug Abuse Act of 1986, 45 U.S.C. § 341 <i>et seq.</i>	24
Ash Pan Act, 45 U.S.C. § 17 <i>et seq.</i> ,	31
Block Signal Act, 45 U.S.C. § 35	31
Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 <i>et seq.</i>	31
Hazardous Materials Transportation Act, 49 U.S.C. App. § 1801 <i>et seq.</i>	31, 32
Hours of Service Act, 45 U.S.C. § 61 <i>et seq.</i>	31, 32
Locomotive Inspection Act, 45 U.S.C. § 22	31
Rail Safety Improvement Act of 1988, Pub.L. No. 100-342, 102 Stat. 624 ..	31, 32, 33
Safety Appliance Act, 45 U.S.C. § 1 <i>et seq.</i>	31
Signal Inspection Act, 49 U.S.C. App. § 26	31
49 C.F.R.:	
Pt. 174	
Sections 174.1-174.840	32
Pt. 219	
Section 219.1	19
Section 219.3	12
Section 219.5(d)	3
Section 219.9(a)(5)	12
Section 219.11	3, 10, 44
Section 219.11(d)	24, 27
Section 219.13	12
Section 219.19	12
Subpart B	
Section 219.101	12, 19
Section 219.101(a)	8

Constitution—Continued:	Page
Section 291.101(a)(2)(ii)	3
Section 219.101(c)	3
Subpart C	
Section 219.201(a)	4, 18
Section 219.201(a)(1)	33
Section 219.201(a)(2)	33
Section 219.201(b)	4, 18
Section 219.201(c)	9
Section 219.203(a)(2)	4, 18
Section 219.203(a)(3)	18
Section 219.203(a)(3)(i)	4
Section 219.205(a)	5
Section 219.213	10, 44
Section 219.213(a)(1)	3
Section 219.213(a)(3)	3
Section 219.213(c)	5, 27
Subpart D	
Section 219.301	12
Section 219.301(b)	4
Section 219.301(b)(1)	9, 34
Section 219.301(b)(2)	4
Section 219.301(b)(3)	5, 9, 34
Section 219.302(c)(2)	5
Section 219.302(c)(2)(ii)	34
Section 219.303	12
Section 219.305	12
Section 219.305(a)	23
Section 219.305(e)	5, 9, 34
Section 219.307	12, 24
Section 219.307(b)	5
Section 219.309	12
Section 219.309(a)	19
Section 219.309(b)(2)	3, 4, 17, 19
Pt. 219, App. B	6
Pt. 225	
Section 225 <i>et seq.</i>	2

Miscellaneous:

Page

<i>House Comm. on Government Operations, Failing The Test: Proficiency Standards Are Needed For Drug Testing Laboratories</i> , H.R. Rep. No. 527, 100th Cong., 2d Sess. (1988)	6, 25
H.R. 5150, 100th Cong. 2d Sess. (1988)	25
S. 2477, 100th Cong. 2d Sess. (1988)	25
<i>Hearings on H.R. 5150 Before the Subcomm. on Oversight and Investigations of the House Comm. on Emery and Commerce</i> , 100th Cong. 2d Sess. (1988) (Opening Statement of Rep. John D. Dingell, Chairman)	25, Add. 1a
48 Fed. Reg. 30,723-30,732 (July 5, 1983)	41
49 Fed. Reg. 24,266-24,271 (June 12, 1984)	41
50 Fed. Reg. August 2, 1985):	
31,508	3
31,510	41
31,513	19, 22
31,517-31,523	3
31,528	6, 12, 22
31,550	17
31,555	5
31,572	6
53 Fed. Reg. 11,970 (April 11, 1988)	5
American Medical Association, <i>AMA News Release: False Lab Results Compound Drug Abuse Dilemma</i> (April 25, 1985)	25
Award No. 23334 of the First Division National Railroad Adjustment Board (June 25, 1982)	12, 22
Bookspan, <i>Behind Open Doors: Constitutional Implications of Government Employee Drug Testing</i> , 11 Nova L.Rev. 307 (1987)	13, 16

Miscellaneous—Continued

Page

L. Dogoloff and R. Angarola, <i>Urine Testing in the Workplace</i> , American Counsel for Drug Education, ed. (1985)	25
Denenberg and Denenberg, <i>Drug Testing From the Arbitrator's Perspective</i> , 11 Nova L.Rev. 371 (1987)	17, 19
Dubowski, <i>Drug Use Testing: Scientific Perspectives</i> , 11 Nova L.Rev. 415 (1987)	19
Feldman and Cohen, <i>The Questionable Accuracy of Breathalyzer Tests</i> , 19 Trial 54 (June 1983)	26
Hawks, <i>The Analysis of Cannabinoids in Biological Fluids</i> , National Institute on Drug Abuse, Monograph No. 42 (1982)	18, 19
Hudner, <i>Urine Testing for Drugs</i> , 11 Nova L.Rev. 553 (1987)	8, 25
Imwinkelreid, <i>Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing</i> , 11 Nova L.Rev. 563 (1987)	13
<i>In Re: Control of Alcohol and Drug Use in Railroad Operation, Advance Notice of Proposed Rulemaking, Docket No. RSOR-6: Hearings Before the Federal Railroad Administration, September 1-2, 1983</i> (statements of Darrell Sorenson, Dir. of Employee Assistance Program, Union Pacific Railroad; William F. Howe, V.P. of Casualty Prevention, and Glen P. Michael, Asst. V.P. for Labor Relations, Chessie System Railroads)	41
Joseph, <i>Fourth Amendment Implications of Public Sector Workplace Drug Testing</i> , 11 Nova L.Rev. 605 (1987)	13, 19, 25
Kurland, <i>The Private I</i> , University of Chicago Magazine (autumn 1976)	40

Miscellaneous—Continued	Page
LaFave, <i>Administrative Searches and the Fourth Amendment: The Camara and See Case</i> , 1967 Sup. Ct. Rev. 1 (1967)	23
McBay, <i>Efficient Drug Testing: Addressing the Basic Issues</i> , 11 Nova L.Rev. 647 (1987)	8
Morgan, <i>Problems of Mass Urine Screening for Misused Drugs</i> , 16 J. Psychoactive Drugs 305 (1984)	19
National Transportation Safety Board, <i>Railroad Accident Report on Derailment of Steam Excursion Train Norfolk and Western Railway Co. Train Extra 611 West, Suffolk, Virginia, May 18, 1986</i> (Rept. No. NTSB/AAR-87/05)	34
Note, <i>Shoemaker v. Handel and Urinalysis Drug Testing: Looking for an American Standard</i> , 21 Georgia L.Rev. 467, 483 (1986)	30, 32
Presidential Executive Order No. 12564	5
M. Rothstein, <i>Medical Screening of Workers</i> (1984)	8, 25
Stille, <i>Drug Testing</i> , Nat'l L.J. (April 7, 1986)	27
U.S. Department of Transportation, Federal Railroad Administration, Office of Safety, <i>Accident/Incident Bulletins Nos. 144-155, 1975-1984</i>	2
U.S. Department of Transportation, Federal Railroad Administration, <i>Field Manual: Control of Alcohol and Drug Use in Railroad Operation</i> (March 1986)	4, 5, 23
U.S. General Accounting Office, <i>Report to the Hon. John Heinz, U.S. Senate, RAILROAD SAFETY, Reporting Time Frames and Results of Post-Accident Drug Tests</i> (April 1988) (GAO-RCED 88-120)	13, 26

Miscellaneous—Continued	Page
<i>Warning of Drug Test Inaccuracies</i> , 122 Lab. Rel. Rep. (BNA) (July 14, 1986)	25
Wingleth and Stevens, <i>Evidentiary Aspects of Alcohol Ingestion, Handling the DUI Case</i> (1980)	42

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

COUNTER-STATEMENT OF THE CASE

There has been no issue of more concern to rail labor than the present one of toxicological testing. Unfortunately, some critics' perception seems to be that because labor is contesting the Federal Railroad Administration's (hereinafter "FRA") rulemaking, we condone alcohol and drug usage. Nothing could be further from the truth. Rail labor yields to no one in its goal to improve rail safety. The country has a right to a safe railroad industry, free from impairment by alcohol or drug use. Nevertheless, the Government's war on drugs, and FRA's actions in mandating and authorizing toxicological testing of railroad workers, must have some boundaries. The laudable goal of a drug-free rail industry must not be reached by means which exceed the confines of the Constitution, nor which nullify the Bill of Rights.

The Petitioners assert that a serious safety problem exists in the railroad industry because of alcohol or drug use (Pet. Br. 3-4).¹ We do not suggest that even one accident or incident caused by alcohol or drugs is not a serious matter. Yet, in view of the statistical frequency of such accidents, and in the overall scheme of things, large scale toxicological testing of railroad employees is an unreasonable approach to the problems of rail safety. There are presently available less intrusive and equally effective methods to accomplish the regulations' objectives.

The record below demonstrates that between 1975 to 1984, there were 76,295 train accidents, 116,127 train incidents, and 433,297 non-train incidents on the nation's railroads.² Of these 626,000+ accidents/incidents, alcohol and drug impairment may have been involved in only 28 train accidents and 20 train incidents, resulting in 37 fatalities and 80 injuries, or 76/10,000 of 1 percent of the total accidents/incidents during this 10-year period. See 50 Fed. Reg. 31,508, and 31,517-23 (August 2, 1985).

¹ The Petitioners (Pet. Br. 2-3) rely in part on a study conducted in 1978 known as "REAP." That study has serious deficiencies. Among the 7 railroads participating in the 1978 study, the selected sample of employees were mailed questionnaires covering 289 items. The self-reporting responses to questionnaires raise considerable problems of reliability.

² These statistics are taken from Accident/Incident Bulletins Nos. 144 through 155 for 1975-1984 (U.S. Dept. of Transportation, FRA Office of Safety).

A train accident is defined as a collision, derailment, or other event involving the operation of railroad on-track equipment resulting in physical property damages that exceed a threshold determined by the FRA pursuant to 49 C.F.R. § 225 *et seq.* The current threshold is \$5,200.00).

A train incident is an event involving the movement of railroad on-track equipment that results in a death, a reportable injury, or a reportable illness, but in which railroad property damage does not exceed \$5,200.00. A non-train incident is an event arising out of railroad operations but does not exceed \$5,200.00 in property damage, and results in a death, a reportable injury or a reportable occupational illness.

The Petitioners' brief presents a somewhat distorted view of the factual setting, and therefore does not identify some of the Respondents' major concerns with the FRA's testing regulations. Some of these concerns are:³

1. The rule covers only those employees subject to the Federal Hours of Service Act. 49 C.F.R. § 219.5(d). As a result, all management personnel are excluded, including those in safety sensitive positions, and all employees on short line railroads employing less than 15 persons are not covered. Furthermore, the rule permits the anomaly of covering certain crafts of employees, and not other crafts which perform the same job function;

2. The rule mandates that the employee "consent" to the testing. 49 C.F.R. § 219.11. The sanction for not consenting to the test is a 9-month disqualification. 49 C.F.R. § 219.213(a)(1). The railroads are free to impose harsher sanctions, and even discharge the employee. 49 C.F.R. § 219.213(a)(3);

3. The rule sets an alcohol level of .04% in the blood as impairment *per se*. 49 C.F.R. § 219.101(a)(2)(ii). With respect to controlled substances, however, no threshold level is set. The FRA recognizes that urine tests cannot measure impairment, and therefore cannot distinguish between use off the job and current impairment. 49 C.F.R. § 219.309(b)(2). Yet, the regulations permit railroads to impose an absolute prohibition of alcohol or any drugs in employees' bodily fluids. 49 C.F.R. § 219.101(c). As a result, many railroads have revised their rules to prohibit "a blood alcohol content greater than 0.00 percent" (J.A. 158) and to provide that "any employee testing positive for a controlled substance (or its metabolite) in the urine is presumed to be under the influence of such drugs." (J.A. 119-124). Thus, as the FRA described in its Field Manual, "positive laboratory reports may result in the railroad taking disciplinary action against the employee, potentially resulting in the loss of employment" (even without any showing of impairment). See *FRA Field Manual*:

³ These are not necessarily listed in order of importance.

Control of Alcohol and Drug Use in Railroad Operation (March 1986) Unit D, § 1.0, p. D-1 (hereinafter "FRA Field Manual"). Also, a railroad is required to inform the employee that because of the sensitivity of the urine test, it may reveal whether or not a person has used drugs up to 60 days before a sample is collected. 49 C.F.R. § 219.309(b)(2). Nevertheless, any positive test will create a presumption that the employee was impaired at the time the sample was taken. (*Id.*). The effect of the above is that even the very smallest detectable amount of metabolite will subject an employee to disciplinary sanctions by the railroads;

4. The events which mandate testing are contained in the regulations at 49 C.F.R. § 219.201(a), and those which authorize testing are located at 49 C.F.R. § 219.301(b). In each of these situations a toxicological test is mandated or authorized regardless of what caused the accident or incident. The record below identifies an example in which an entire crew was tested in Arkansas on March 11, 1986, because of a derailment resulting from tornado-like winds (J.A. 137-139). Such a case evinces the potential for abuse of the testing practices and constant harassment of employees, and exemplifies the "randomness" of the testing;

On the other hand, no tests are required at highway grade crossing accidents even though a majority of all deaths on the railroads occur in such accidents. *See* 49 C.F.R. § 219.201(b);

5. The rule incorporates the notion of suspicion by association in that the entire crew of a train is required to be tested under the Subpart C post-accident mandatory testing even though such persons may not have been involved in the event which gave rise to the test. 49 C.F.R. § 219.203(a)(2). The only exception is where the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause of the accident. 49 C.F.R. § 219.203(a)(3)(i). Also, under the so-called reasonable cause testing of Subpart D, there is nothing to prevent a railroad from testing the entire crew after an accident or incident. *See* 49 C.F.R. § 219.301(b)(2);

6. The FRA instructs railroads to collect urine samples in compliance with its Field Manual. *See* 49 C.F.R. § 219.205(a). The Field Manual requires that each urine sample be provided under the "direct observation" of technicians, and failure of an employee to provide a sufficient amount of urine may result in disciplinary action. FRA Field Manual, D-5 (1986).

7. The hearing procedure in the rule is restricted to questioning only the reasons behind the employees refusal to take the test. 49 C.F.R. § 219.213(c);

8. An employee may be tested even for a relatively minor rule violation, regardless of whether such employee is suspected of being impaired by alcohol or drugs. 49 C.F.R. § 219.301(b)(3);

9. Under the so-called reasonable suspicion testing, two supervisors must concur if drug impairment is suspected, but only one supervisor is required to have only 3 hours of special training in signs of drug intoxication. 49 C.F.R. § 219.302(c)(2);

10. Nothing in the regulations restrict full discretion available to a railroad to conduct testing beyond that mandated in Subpart C or authorized in Subpart D. 49 C.F.R. § 219.305(e). There is no requirement that a railroad which conducts additional testing need confirm an initial positive immunoassay test. This is so even though the FRA made clear that, under its rule, an immunoassay would not constitute an acceptable confirmatory test (49 C.F.R. § 219.307(b)) because such tests "generally carry the potential for a known percentage of 'false-positive' results." 50 Fed. Reg. 31,555 (August 2, 1985); (*see also* Pet. Br. 12, n.17);

11. The laboratories performing the post-accident tests are not required to be certified,⁴ nor have they been sufficiently competent. As initially promulgated, the FRA regulations

⁴ On the other hand all testing of federal employees pursuant to the Presidential Executive Order No. 12564 must be performed by certified laboratories. *See* 53 Fed. Reg. 11,970 (April 11, 1988).

designated the Civil Aeromedical Laboratory in Oklahoma City ("CAMI") to conduct all Subpart C testing. See 50 Fed. Reg. 31,572 (August 2, 1985). However, because of falsification of test results and other irregularities, (see *House Comm. on Government Operations, Failing The Test: Proficiency Standards Are Needed For Drug Testing Laboratories*, H.R. Rep. No. 777, 100th Cong., 2d Sess. 10 (1988)), effective March 30, 1987, CAMI's relationship was terminated and such tests are now being performed by the Center for Human Toxicology at the University of Utah. 49 C.F.R. Part 219, App. B. With respect to all other testing authorized under Subpart D of the rule, each railroad has sole discretion to choose any laboratory it desires, with very limited restrictions, and the laboratory need not be certified;

12. As conceded by Petitioner (Pet. Br. 10 fn. 15) there is a lack of guarantee of confidentiality in the regulations. The FRA may release testing results to prosecutors.

Because of these and other concerns, which indicate the unreasonableness of the FRA rulemaking, the Respondents commenced this action on October 31, 1985, seeking declaratory and injunctive relief against enforcement of the regulations.

SUMMARY OF ARGUMENT

A. Forced administration of a blood test clearly implicates the search and seizure provisions of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966). The Petitioners have conceded that testing under Subpart C of the regulations (the mandatory testing) must be regarded as a Fourth Amendment search, and that testing under Subpart D of the regulations (the authorized testing) should be regarded as a search if the testing is deemed state action. (Pet. Br. 25, n.26). By the FRA's own admission, the testing requirements of Subpart D have been authorized because the railroads would not otherwise be allowed to test. See 50 Fed. Reg. 31,528 (August 2, 1985). This federal regulatory "imprimatur," see *Railway Employees' Department v. Hanson*, 351 U.S. 225, 232 (1956), evinces such significant encouragement that the decision to conduct testing under Subpart D of the regulations cannot be deemed a consequence of private initiative. Because

Subpart D testing is state action under this analysis, it should be regarded as a Fourth Amendment search. The virtually unanimous opinion of lower courts and commentators alike supports such a finding. See, e.g., *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 580 (9th Cir.), cert. granted, 108 S. Ct. 2033 (1988); *National Federation of Federation Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987).

B.1. The crux of this case is whether compulsory drug and alcohol tests, without particularized suspicion of impairment, constitute "unreasonable" searches and seizures. The Petitioners do not contend that the occurrence of an accident/incident or rule violation creates individualized suspicion of impairment (Pet. Br. 18). Rather, they argue that individualized suspicion is not required (Pet. Br. 17, 22). It follows that the regulations fail constitutional muster if the Court determines that individualized suspicion is a requisite to the alcohol and drug tests of railroad workers. In determining the standard of reasonableness governing searches, the Court has employed a number of different criteria. Because of the safety concerns, this case involves "special needs, beyond the normal need for law enforcement" which justifies application of the twofold inquiry of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). See *Id.* at 351 (Blackmun, J., concurring). In order to be reasonable under this inquiry, a search must be "justified at its inception" and "reasonably related in scope" to the circumstances justifying the search. *Id.* at 341. The FRA regulations fail both prongs of this *T.L.O.* test.

2. The record below indicates that only 5.0% of the individuals sampled under Subpart C of the regulations (through December 31, 1987) tested positive for the presence of alcohol or medically unauthorized controlled substances (J.A. 193). Because an overwhelming 95% of the employees test negative, the FRA has no reasonable grounds for suspecting that searching an employee will turn up evidence of impairment. Nor does the mere occurrence of an accident or incident provide reasonable grounds for suspecting that drug or alcohol use played any role in the event. Additionally, because neither blood nor urine tests can measure drug impairment (see Denenberg and Denenberg, *Drug Testing From The Arbitrator's Perspective*, 11 Nova L.Rev. 371, 403

(1987); Hawks, *The Analysis of Cannabinoids in the Biological Fluids*, National Institute on Drug Abuse, Monograph No. 42, at 4 (1982); Mcbay, *Efficient Drug Testing: Addressing the Basic Issues*, 11 Nova L.Rev. 647, 649 (1987)), the Government's interests in conducting such tests are severely weakened. Since the goal of the regulations is to prevent accidents caused by impairment (and impairment is what is prohibited *see* 49 C.F.R. § 219.101(a)), testing which cannot determine the degree of impairment is unjustifiable. There is an insufficient nexus between what the test can reveal, and what the regulations are trying to accomplish.

C. The Court has allowed exceptions to the requirement of individualized suspicion, but only where the "privacy interests implicated by a search are minimal" and where "other safeguards" exist to limit the discretion of the official in the field. *T.L.O.*, 469 U.S. at 342, n.8.

1. The privacy interests of railroad workers cannot be characterized as minimal. This Court has recognized that "even a limited search of the person is a substantial invasion of privacy." *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). Blood testing under the regulations requires actual intrusions into employees' bodies, and urine testing involves a psychological intrusion of tremendous proportions. Employees lose all bodily control as they are forced to urinate on demand under the watchful eye of medical facility technicians. Urine testing produces distinct feelings of humiliation, degradation, anger, anxiety over errors, etc. Because blood, breath, and urine tests under the FRA rule are founded on distrust, and stigmatize employees, they are distinguishable from ordinary medical examinations. The intrusion is made even more frightening by the fact that each employee's job and future is at stake, and the testing is fraught with many inaccuracies. The literature is replete with discussions of the incompetency of laboratories and the inaccuracy of test results. *See, e.g.*, Hudner, *Urine Testing For Drugs*, 11 Nova L.Rev. 553, 554-558 (1987); M. Rothstein, *Medical Screening of Workers*, 71 (1984). The fact that testing is conducted as an aspect of an employment relationship does not reduce either the intrusiveness of the searches, or the reasonableness of employees' privacy expectations. Employees' blood, breath,

and urine are not things which a railroad ordinarily has, nor must have, access to in order to meet its safety needs.

2. The closely-regulated industry exception to individualized suspicion is inapplicable to drug and alcohol testing of railroad employees. This Court has never extended the closely-regulated industry exception to searches of persons, but has applied it only to searches of property, where the invasion was limited. Indeed, the exception has been justified by the impersonal nature of the searches, which entail limited invasions upon privacy, and are not aimed at the discovery of criminal evidence. *See Camara v. Municipal Court*, 387 U.S. 523, 537 (1967). Even if the exception were extended to persons, it should not be applied here because railroad workers are not a highly regulated industry. Regulation of railroad employees has been neither pervasive nor long standing, and has not reduced privacy expectations over their bodies and bodily fluids. *See New York v. Burger*, 107 S.Ct. 2636, 2643 (1987).

3. Railroad supervisory personnel are given tremendous discretion in determining whether a test is to be conducted. Supervisors are required to make immediate on-the-scene evaluations of property damage. *See* 49 C.F.R. § 291.201(c). They alone determine whether the rule which triggers the test has been violated. *See* 49 C.F.R. § 219.301(b)(3). Supervisors with virtually no training are allowed to make judgments as to reasonable suspicion of impairment. *See* 49 C.F.R. § 219.301(b)(1). The ultimate discretion is delegated to railroads by allowing them to perform tests under any conditions they may wish. *See* 49 C.F.R. § 219.305(e). Because employees' privacy interests are not minimal, and because there are insufficient safeguards to limit official discretion, an exception to the requirement of individualized suspicion would be inappropriate in this case.

D. The Petitioners argue that the regulations serve compelling governmental interests because they (1) will help to deter alcohol and drug use on the job; (2) permit greater precision of the causes of major accidents, and (3) found alternative approaches wanting. As to each of these the Petitioners' rationale is flawed.

1. First, an employee who is not already deterred by the risk of an accident while impaired is not likely to be deterred by the risk of a post accident test. The truth is that alcohol and drug users do not believe they will be caught by any web of testing.

2. Secondly, obtaining better data does not justify invasive testing. The causes of railroad accidents can be determined by lesser intrusions (*see infra* 40-43), and still reliable evidence can be gathered concerning the cause of an accident. We do not question that the public interest justifies determining the cause of each railroad accident. Rather, the issue is whether the government is prevented from ascertaining the cause of an accident if particularized suspicion is required before a search is permitted. It clearly is not if the other less intrusive means identified in this brief are adopted.

3. Lastly, where certain fundamental rights are involved, the Court has required that regulations be narrowly drawn. In the context of the Fourth Amendment, the Court has stated that searches may not be overly broad in scope. *See Terry v. Ohio*, 392 U.S. at 19; *cf. New Jersey v. T.L.O.*, 469 U.S. at 341 (requiring that searches be reasonably related in scope to the circumstances justifying the search). There are presently available a number of less drastic and equally effective means to address the government's safety needs, including, but not limited to, voluntary co-operative agreements between employees and the railroads, improved detection training, testing akin to roadside sobriety tests, and increased supervision of employees.

E. The Implied Consent provision, 49 C.F.R. § 219.11, cannot validate the searches. The Fourth Amendment requires that a consent not be coerced, by implied threat or covert force. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Because employees refusing to provide blood or urine samples are subject to a nine month suspension (*see* 49 C.F.R. § 219.213), the FRA has imposed an unreasonable choice upon the employees, and the consent feature is therefore invalid.

ARGUMENT

I. THE FRA REGULATIONS ARE UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT

A. The Drug And Alcohol Testing Mandated And Authorized By 49 C.F.R. Part 219 Constitutes A Search And Seizure Within The Meaning of the Fourth Amendment.

1. It is well-settled that compulsory administration of a blood test implicates the search and seizure provisions of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966). For this reason, the Petitioners have conceded that post-accident testing under 49 C.F.R. Part 219, Subpart C, must be regarded as a Fourth Amendment search. (Pet. Br. 24-25, n. 26). Petitioners also concede that testing authorized by Subpart D should be considered a Fourth Amendment search if such testing can be regarded as governmental action. *Id.*

The fact that Subpart D testing is only authorized, and not required, by the FRA regulations does not mean that the testing is not governmental action. The Court made it clear in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), that state action would be found if "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* at 351. The Court has recognized that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *see also, Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357.

Analysis of the FRA regulations reveal such significant governmental participation in, and encouragement of, Subpart D testing, that the testing must be deemed "government action." First of all, the regulations are applicable to all railroads, with only few specified exceptions. 49 C.F.R. § 219.3. Railroads are subject to civil penalties for conducting "for cause" testing outside the parameters of Subpart D. 49 C.F.R. § 219.9(a)(5). Second, the regulations preempt any state law covering the same subject matter, including any state law on the subject of "for cause" testing. See 49 C.F.R. § 219.13. Third, the regulations authorize testing by the railroads, they specify the observations and events for which testing is authorized, they specify evidentiary standards for determining whether tests are required, and list the prohibitions which apply to both Subpart C and D. See 49 C.F.R. § 219.101, and § 219.301. Fourth, the regulations explicitly set forth the precise procedures and safeguards governing breath and urine tests, and require that urine sampling and testing be conducted at an independent medical facility. See 49 C.F.R. §§ 219.303, 219.305, and 219.307. Recommended practice standards for Subpart D testing are also set forth in the FRA Alcohol and Drug Field Manual. See 49 C.F.R. § 219.19. Finally, the regulations allow a railroad to make a presumption of impairment in the event an employee refuses to take a blood test after a urine sample has tested positive, and requires the railroad to provide effective notice of the preemption. 49 C.F.R. § 219.309.

By the FRA's own admission, it has authorized these requirements precisely because absent this federal regulatory imprimatur, the railroads could not engage in the testing. See 50 Fed. Reg. 31,528 (August 2, 1985); Award No. 23334 of the First Division, National Railroad Adjustment Board (June 25, 1982). Under these circumstances, it is specious for the Petitioners to argue that Subpart D testing is not federal action. It is *solely* by virtue of the contested regulations that railroads have the authority to test. Subpart D is more than a mere authorization to the railroads to test under specified circumstances. It is the regulations which relieve the railroads of the constraints of its labor contracts and of state laws. 50 Fed. Reg. 31,528 (August 2, 1985). The regulations are the source of power and authority by which the railroads can conduct Subpart D testing. Cf. *Railway Employees'*

Department v. Hanson, 351 U.S. 225, 232 (1956) (held that otherwise private conduct under a union shop agreement was state action because a federal statute authorized such agreements and preempted state law on the subject). The regulations evince such significant encouragement that the decision to conduct the testing cannot be deemed a consequence of private choice and initiative. See *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 581-582 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988).

2. The virtually unanimous opinion of lower courts and commentators alike is that compulsory urine testing is materially indistinguishable from the blood testing in *Schmerber*, and therefore qualifies as a Fourth Amendment search. See, e.g., *RLEA v. Burnley*, 839 F.2d at 580; *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988); *McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Everett v. Napper*, 833 F.2d 1507, 1509 (11th Cir. 1987); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1542 (6th Cir. 1988); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266-67 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1434 (N.D. Ill. 1987); Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing* (hereinafter *Behind Open Doors*) 11 Nova L. Rev. 307, 328 (1987); Imwinkelreid, *Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing*, 11 Nova L. Rev. 563, 571 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L. Rev. 605, 616 (1987).⁵ Those courts which have

⁵ Although most courts and commentators refer to urinalyses as Fourth Amendment "searches," the "seizure" provision is also applicable. *Schmerber*, 384 U.S. at 767 ("Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment"). Urine testing under the regulations can take several hours' time. See U.S. General Accounting Office, Report to the Hon. John Heinz, U.S. Senate, RAILROAD

considered the question have also found breath tests to be Fourth Amendment searches. *E.g.*, *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986); *see also*, *Shoemaker v. Handel*, 795 F.2d at 1141; *RLEA v. Burnley*, 839 F.2d at 580; *People v. Carlson*, 677 P.2d 310, 317 (Colo. 1984).

Analysis of Court dicta regarding the Fourth Amendment's purposes further supports the proposition that urine testing for drugs constitutes a search and seizure. In *Katz v. United States*, 389 U.S. 347, 351 (1967), the Court emphasized that the Fourth Amendment "protects people, not places." Indeed, the basic purpose of this Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions of governmental officials." *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978). Logically, it follows that Fourth Amendment protections are greatest in the context of personal searches.

Concurring in *Katz*, 389 U. S. at 361, Justice Harlan set forth an oft-cited twofold requirement for determining the applicability of the Fourth Amendment: "first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Application of this test to the present case compels the conclusion that compulsory urine tests are Fourth Amendment searches and seizures.

All people exhibit a subjective expectation of privacy in the act of urination, one of the most private of all activities. This expectation is undoubtedly one that society is prepared to consider reasonable. (*see infra* 20-23). "There are few other times where individuals insist as strongly and universally that they be let alone to act in private." *Lovvorn v. City of Chattanooga*, 846 F.2d at 1542. Governmental interference

SAFETY, Reporting Time Frames and Results of Post Accident Drug Tests, at 4 (April 1988) (GAO-RCED 88-120). The liberty of these employees is unquestionably restrained at such times, thereby making urine testing a seizure as well as a search.

with this expectation, therefore, constitutes a Fourth Amendment search. *See RLEA v. Burnley*, 839 F.2d at 580.

B. The Fourth Amendment Requires Particularized Suspicion Before Railroad Workers May Be Tested For Drug Or Alcohol Impairment

1. The Appropriate Standard of Reasonableness.

To hold that the Fourth Amendment applies to compulsory blood tests and urinalyses is only to begin the inquiry into the standards governing such searches. *See New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). The Fourth Amendment expressly prohibits only "unreasonable" searches. *Carroll v. United States*, 267 U.S. 132, 147 (1925). The critical issue in this case, therefore, is whether compulsory urinalysis or blood testing of railroad workers, without particularized suspicion of impairment, constitutes an "unreasonable" search. The Petitioners do not contend that the occurrence of an accident/incident or rule violation creates individualized suspicion of impairment (Pet. Br. 18). Rather, they argue that individualized suspicion is not required (Pet. Br. 17, 22). It follows that the regulations fail constitutional muster if the Court determines that individualized suspicion is a requisite to the alcohol and drug tests of railroad workers.⁶

The Court has repeatedly stated that the determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." *New Jersey v. T.L.O.*, 469 U.S. at 337 (*quoting Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967)); *Terry v. Ohio*, 392 U.S. 1, 21

⁶ Even assuming *arguendo* that the Court does not hold individualized suspicion a requisite here, we still believe the regulations are unconstitutional. The searches here cannot satisfy the two prong test of *New Jersey v. T.L.O.*, that the searches are justified at the inception and reasonably related in scope to the circumstances which justified the search. (*See infra* 17-20).

(1968). The Court has supplemented this amorphous requirement with more particular criteria. The traditional rule is that searches conducted outside the judicial process, *i.e.*, without a warrant, are *per se* unreasonable under the Fourth Amendment, subject to a few specifically established and well-delineated exceptions. See *Katz v. United States*, 389 U.S. at 357 (1967); *Accord Camara v. Municipal Court*, 387 U.S. at 528-529; *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499 (1987) (plurality opinion).⁷ This rule acknowledges the requirement of "prior judicial judgment" contemplated by the Fourth Amendment. See *United States v. United States District Court*, 407 U.S. 297, 317 (1972).

The Court has applied different criteria, however, in "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring); *O'Connor v. Ortega*, 107 S. Ct. at 1500. Thus, in *New Jersey v. T.L.O.*, 469 U.S. at 341, the Court enunciated the following test of reasonableness:

Determining the reasonableness of any search involves a twofold inquiry: first, one

⁷ There are a number of such exceptions: (1) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383 (1914); (2) the "automobile exception," *Carroll v. United States*, 267 U.S. 132 (1925); (3) hot pursuit, *Warden v. Hayden*, 387 U.S. 294 (1967); (4) stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968); (5) plain view, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); (6) border searches, *United States v. Ortiz*, 422 U.S. 891 (1975); (7) administrative searches of closely regulated industries, *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) *cert. denied*, 479 U.S. 986 (1986); (8) inventory searches, *Illinois v. LaFayette*, 462 U.S. 640 (1983); *Michigan v. Thomas*, 458 U.S. 259 (1982); *South Dakota v. Opperman*, 428 U.S. 364 (1976); (9) searches of school children's possessions at school, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); (10) consent, *United States v. Mendenhall*, 446 U.S. 446 (1980); *United States v. Watson*, 423 U.S. 411 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), *Bookspan, Behind Open Doors*, 11 Nova L.Rev. at 331, n.117.

must consider 'whether the . . . action was justified at its inception.' *Terry v. Ohio*, 392 U.S. at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'

The Respondents contend that the search of railroad employees under the FRA regulations is governed by this *T.L.O.* twofold test of "reasonableness under all the circumstances." See *Id.* at 341 and 351; *RLEA v. Burnley*, 839 F.2d at 587.⁸

2. Application Of The Twofold Inquiry To The Facts In This Case.

In *T.L.O.* the Court held that a search of a student by school officials would be justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." 469 U.S. at 342. Such a search would be permissible in its scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive" *Id.* Applying these standards to the present case indicates that the FRA regulations are unconstitutional.

⁸ We acknowledge that the exigencies of drug and alcohol testing, *i.e.* the disappearance of evidence in blood and urine over time, make the warrant requirement impracticable in *some* circumstances. Yet there are circumstances, especially under Subpart D, in which adherence to the traditional warrant requirement would be both possible and preferable. The Petitioners concede that evidence of drug use remains in urine for several days (Pet. Br. 42, n.45), and in some cases can remain up to sixty days. 49 C.F.R. § 219.309(b)(2); 50 Fed. Reg. 31,550 (August 2, 1985). Where a breath test reveals no alcohol impairment, there is no reason why urine testing for drugs cannot await determination by an impartial magistrate that probable cause or the requisite level of suspicion has been met.

Statistical evidence compiled in the record below shows that from February 10, 1986, through December 31, 1987, 1,508 individual railroad employees were tested under Subpart C of the regulation,⁹ and only 76 individuals (5.0%) tested positive for the presence of alcohol or medically unauthorized controlled substances (J.A. 193).¹⁰ Obviously, this means that each time the FRA requires an individual to be tested under Subpart C, the overwhelming probability (95%) is that no evidence of a violation will be revealed by the search. Such searches are clearly unjustified under *T.L.O.* because no reasonable grounds exist to suspect that testing an employee will turn up evidence. See also, *Delaware v. Prouse*, 440 U.S. 648, 659-660 (1978).

As more eloquently stated by Judge H. Lee Sarokin in *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D. N.J. 1986):

If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental tenets of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.

Moreover, because the testing is triggered by the occurrence of an event, and not by any suspicion of impairment, such testing by definition is not justified at its

⁹ Under Subpart C, testing is required for each crew member of any train involved in a major train accident, an impact accident, or a fatal train incident. 49 C.F.R. § 219.201(a) and § 219.203(a)(2). Note exceptions in § 219.201(b) and § 219.203(a)(3) for Subpart C testing. There are no exceptions to testing the entire crew under Subpart D.

¹⁰ These figures indicate "positives" (i.e. any metabolite in a sample of urine, or blood, or both). Because blood and urine testing cannot measure impairment, (see *infra* 19-20) the actual number of positives (i.e., actual impairment as opposed to samples containing drug metabolites) are lower than the 5.0% indicated.

inception under *T.L.O.* As noted *supra* at 2, alcohol or drug impairment may have played a part in only 76/10,000 of 1 percent of the total accidents/incidents between 1975 and 1984. The occurrence of an accident/incident, by itself, does not provide reasonable grounds for suspecting that tests will demonstrate impairment in any one employee, much less an entire train crew. See *RLEA v. Burnley*, 839 F.2d at 587.

The same reasoning applies to toxicological testing under Subpart D. Insofar as Subpart D testing can be triggered by an accident/incident, or a rule violation, regardless of whether impairment is suspected, such testing is not justified at its inception. The *T.L.O.* test requires that a railroad have reasonable grounds for suspecting that the search will turn up evidence of a violation. In the regulations such evidence must be of use or impairment by alcohol or drugs while assigned to duty. Testing after an accident/incident, or rule violation lacks the requisite level of suspicion.

Nor are such searches permissible in scope under the *T.L.O.* test. The stated purpose of the regulations is "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol and drugs." 49 C.F.R. § 219.1. To this end, the regulations prohibit "impairment" and the use or possession of alcohol or drugs while assigned to covered service. 49 C.F.R. § 219.101. Yet the methods adopted by the regulations do not reasonably relate to this laudable purpose, or reasonably follow from these legitimate prohibitions.

The literature on drug testing conclusively establishes that neither blood nor urine tests can measure current drug intoxication or degree of impairment. See Dubowski, *Drug Use Testing: Scientific Perspectives*, 11 Nova L. Rev. 415, 526-529 (1987); Denenberg and Denenberg, *Drug Testing from the Arbitrator's Perspective*, 11 Nova L. Rev. 371, 403 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L. Rev. 605, 632 (1987); Hawks, *The Analysis of Cannabinoids in the Biological Fluids*, National Institute on Drug Abuse, Monograph No. 42, at 4 (1982); Morgan, *Problems of Urine Screening for Misused Drugs*, 16 J. Psychoactive Drugs 305,

306 (1984)¹¹ The FRA concedes as much in the regulations, 49 C.F.R. § 219.309(b)(2); *see also* 50 Fed. Reg. 31,513 (August 2, 1985), in that they require railroads to provide notice of this fact to each employee tested under Subpart D. The tests do not indicate how much may have been used, when it was used or what were the effects of such use. This severely weakens the Government's interests in mandating and authorizing such tests. Since the goal of the regulations is to prevent accidents caused by impairment, testing which cannot determine the degree of impairment is unjustifiable. There is an insufficient nexus between what the test can reveal, and what the regulations are trying to accomplish.

The shortcomings of urine testing are more egregious under Subpart D. Blood tests, though available to employees, are not required by the railroads or authorized by the FRA. Yet, under the presumption of impairment provision, 49 C.F.R. § 219.309(a), an employee who exercises his right to provide only a urine sample may be disciplined or terminated for conduct which does not violate the regulations, in that metabolites remaining in urine from past off the job drug use (in rare cases up to 60 days) can be detected. This provision can thereby transform off duty conduct, having no relation to job performance or impairment, into a violation. The scope of such a search is clearly impermissible. Indirectly regulating off duty conduct is not reasonably related to the asserted goal of the regulations.

That such testing may provide important information to the public, or may make possible "enlightened and proportional regulation" by the FRA (Pet. Br. 12-13), is not enough to satisfy the second prong of the *T.L.O.* test. Such abstract and unquantifiable societal benefits do not outweigh the concrete injuries repeatedly suffered by innocent railroad workers under the regulations. The deterrent value of such tests is highly questionable, and certainly bears a tenuous connection to the regulations' stated purpose.

¹¹ Blood tests can determine recent usage, but not impairment.

C. The Significant Privacy Interests of Railroad Workers And The Wide Discretion Afforded Railroad Officials Render Any Exception To Particularized Suspicion Inappropriate.

The Court has allowed exceptions to the requirement of particularized suspicion "only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field'." *New Jersey v. T.L.O.*, 469 U.S. at 342, n.8 (citations omitted). We believe that the FRA regulations cannot be justified through this exception because the railroad workers' privacy interests are not minimal, and neither are there sufficient safeguards to limit the discretion of the official in the field.

1. Railroad Employees' Privacy Interests Are Not Minimal

There are a host of reasons why the privacy interests of railroad employees cannot be characterized as minimal. By evaluating the intrusiveness of the testing, realizing the potential harms the employees may suffer under the FRA rule, and recognizing that employment in a safety sensitive industry does not strip employees of constitutional protection, the significance of railroad employees' privacy interests becomes more evident. In truth, the extent of these privacy interests may depend on whose ox is being gored. To the individual being tested, there are distinct feelings of humiliation, offensiveness, anger, distrust, distress, emotional pain, concern, apprehension, and anxiety over errors, etc. *See Taylor v. O'Grady*, 669 F. Supp. at 1434. Not the least of these major concerns is that each employee's job and future is at stake. It may be difficult for those persons not the focus of such a test to fully comprehend its intrusiveness. Yet it is absurd for the Petitioners to characterize the tests as a mere "inconvenience" (Pet. Br. 19), or to say that railroad workers "may feel self-conscious" about the collection process (Pet. Br. 35).

The Court has acknowledged that "even a limited search of the person is a substantial invasion of privacy." *Terry v. Ohio*, 392 U.S. at 24-25. Blood testing involves physical intrusions into the human body. See 50 Fed. Reg. 31,513 (August 2, 1985). While it may be a routine procedure in some circumstances, see *Schmerber v. California*, 384 U.S. at 771, it is hardly routine here. The greater risk of error, risk of job loss, and the quasi-criminal nature of the search, act to easily distinguish such a test from ordinary physical or medical examinations. While there is an element of trust in a medical examination, the test under the FRA rule is founded on distrust, and stigmatizes the employee as a suspected law breaker. Otherwise satisfactory employees¹² must prove themselves innocent of drug and alcohol violations by exposing their private parts and supplying bodily fluids for scrutiny.

Urine tests may not involve actual intrusions into the body, but the overall intrusiveness of such tests cannot be denied. The act of urination is undoubtedly one of the most private of all functions, as to which virtually all people exhibit an expectation of privacy. It is a function ordinarily performed in private, if not in solitude, and which is usually prohibited in public. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D. N.J. 1986); *NTEU v. Von Raab*, 816 F.2d at 175. Although urine, unlike blood, is routinely and necessarily discharged from the body, "it is normally discharged and disposed of under circumstances that merit protection from arbitrary interference." *Capua*, 643 F. Supp. at 1513.

Breath tests, although concededly less invasive than blood or urine tests, are by no means minor intrusions. As construed in arbitration and in the courts, compulsory breath tests constitute a "major dispute"; such tests are unauthorized by many collective bargaining agreements. See Award No. 23334 of the First Division, National Railroad Adjustment Board (June 25, 1982); 50 Fed. Reg. 31,528 (August 2, 1985).

¹² Assuming that otherwise unsatisfactory employees would not be discharged from service by the railroads.

Nor can it seriously be doubted that this expectation of privacy is one which society is prepared to recognize as reasonable. Although the government has a strong interest in general public safety, the regulations unnecessarily and impermissibly slight the privacy expectations of railroad workers. Urine testing deprives railroad workers of all bodily control. Being forced to urinate on demand, in the presence of a monitor, or being forced to drink liquids until a sample can be provided, is a governmental intrusion of tremendous proportions. Ordinarily, a person expects to control both the timing and the ultimate disposition of his urine. The fact that blood and urine samples are required to be collected at an independent medical facility, 49 C.F.R. § 219.305(a), does little to reduce the intrusiveness of the sampling. The regulations require that sample collection be supervised under the watchful eyes of technicians of the medical facility.¹³ *Id.*; see also FRA Field Manual, Unit D, ¶¶ 4.5.2 and 4.5.3 at p. D-5. In addition to the loss of bodily control, and the supervised urination, it is humiliating and degrading for railroad workers to realize that submission to this type of test is the only way to vindicate themselves.

The drug and alcohol tests entail significant psychological intrusions. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-560 (1976); *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). In the testing under the Secretary's regulation, the intrusiveness under certain conditions even exceed some criminal searches. The psychological intrusion of administrative searches are ordinarily relatively low because stigma and fear are essentially absent. See *Camara v. Municipal Court*, 387 U.S. at 530, LaFare, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 Sup. Ct. Rev. 1, 19 (1967). By contrast, the psychological intrusion in the drug and

¹³ A number of variables, including the employee's sex, religion, age, cultural background, or the presence of private medical conditions, disabilities, or disorders, can dramatically increase the intrusiveness of urine sampling. In the case of a female employee, it may depend upon the time of the month a sample is required. See Petitioners' Brief at 21, *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), cert. granted, 108 S. Ct. 1072 (1988) (No. 86-1879).

alcohol tests here are excessive. The intrusion is almost always hostile, because the individual employees are subject to the discretion of a railroad supervisor (*see infra* 33-35) and not a governmental inspector. The entire process is frightening because the employee may lose his job as a result of the test.

Another aspect of the psychological intrusiveness of the searches is that the test results could reveal evidence of a crime. Congress recently enacted the Anti-Drug Abuse Act of 1986, 45 U.S.C. § 341 *et seq.*, which provides, *inter alia*, that whoever operates or directs the operation of a common carrier (*i.e.* a railroad) while under the influence of alcohol or drugs, shall be imprisoned not more than five years or fined not more than \$10,000 or both. Nothing in the regulations prevent a prosecutor from gaining immediate access to blood and urine samples, or to test results, for use in a criminal proceeding. *See* 49 C.F.R. § 219.11(d); (Pet. Br. 10, n.15). Thus, the regulation permits the Government to obtain indirectly evidence that it may not acquire directly, *i.e.*, evidence of a crime without a showing of probable cause (or even particularized suspicion). We acknowledge the dicta in *New York v. Burger*, 107 S. Ct. 2636, 2651 (1987), to the effect that "discovery of evidence of crimes" in the course of enforcing an administrative scheme does not necessarily "render that search illegal." Nevertheless, we submit that the quasi-criminal nature of the tests adds to their intrusiveness and is a factor which should be considered in determining reasonableness.

This psychological intrusion is made even more frightening because the testing is fraught with many inaccuracies. There is currently, no uniform scientific oversight of these commercial laboratories by a recognized scientific or governmental agency. The regulations require only that the laboratories perform a confirmatory procedure and shall regularly participate in an external quality control program that involves the analysis of samples submitted by a reference laboratory. (49 C.F.R. § 219.307). Some laboratories employ their own private consultants to conduct proficiency tests. However, there is no common certification standard nor proficiency testing criteria which all drug testing laboratories are required to meet. On the other hand all testing

of employees of Federal agencies are required to be performed by laboratories certified in accordance with standards established by the U.S. Department of Health and Human Services. (53 Fed. Reg. 11,970 (April 11, 1988)). The literature is replete with discussions of the incompetency of drug testing laboratories and the inaccuracy of test results. *See House Comm. on Government Operations, Failing The Test: Proficiency Standards Are Need For Drug Testing Laboratories*, H.R. Rep. No. 527, 100th Cong., 2d Sess. (1988); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L.Rev. 605, 632 (1987); Hudner, *Urine Testing For Drugs*, 11 Nova L.Rev. 553, 554-558 (1987); L. Dogoloff and R. Angarola, *Urine Testing In The Work Place*, 20-22, the American Counsel for Education, ed. 1985; M. Rothstein, *Medical Screening Of Workers*, 71 (1984); *Warning Of Drug Test Inaccuracies*, 122 Lab. Rel. Rep. (BNA) 179, 180 (July 14, 1986). In one blind study conducted by the Center for Disease Control and the National Institute on Drug Abuse, 91% of laboratories tested had unacceptable false-negative rates for barbiturates, 100% for amphetamines, 50% for methadone, 91% for cocaine, 15% for codeine, and 92% for morphine. *See* American Medical Association, AMA News Release: *False Lab Results Compound Drug Abuse Dilemma* (April 25, 1985). (*See* J.A. 70). This may be an egregious example, but it evinces the potential for error, and highlights the psychological intrusiveness of the blood and urine tests under the regulations. The manner in which the test results are used place an enormous burden on the quality of the results. In recognition of this major problem, both houses of Congress are considering corrective legislation.¹⁴ Breath tests, also, can produce unpredictable, and hence unacceptable, results.

¹⁴ On August 10, 1988, S. 2477 was favorably reported by the Senate Labor and Human Resources Committee. On August 9, 1988, H.R. 5150 was reported by the House Committee on Energy and Commerce. *See also Hearings on H.R. 5150 Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong. 2d Sess. (1988) (opening statement, dated July 27, 1988, of Rep. John D. Dingell, Chairman). (*See* Resp. Add. A-1). Each bill would force drug testing laboratories to increase the accuracy of their tests.

See Feldman and Cohen, *The Questionable Accuracy of Breathalyzer Tests*, 19 Trial 54 (June 1983).

Additionally, under the regulations, the blood and urine collection procedure may take several hours' time, see U.S. General Accounting Office, Report to the Honorable John Heinz, U.S. Senate, RAILROAD SAFETY, Reporting Time Frames and Results of Post-Accident Drug Tests, at 4 (April 1988) (GAO-RCED 88-120), during which the railroad workers are not free to leave. This has the effect of aggravating the "seizure" aspect of the testing. The railroad workers are, in effect, "under arrest" until a sample is provided.

The fact that the drug and alcohol tests are conducted as an aspect of an employment relationship does nothing to reduce the intrusiveness of the searches, or the reasonableness of railroad employees' privacy expectations. In *O'Connor v. Ortega*, 107 S. Ct. at 1498, the plurality recognized the societal expectations of privacy in one's place of work.¹⁵ We submit, however, that the decision in *Ortega* was justified, in part, by the lesser expectation of privacy which government employees have in their place of work, as opposed to their homes, or in other contexts, *Id.* at 1498, and that greater privacy expectations are involved in this case. The drug and alcohol tests entail more than a limited invasion. The privacy interests of railroad workers in bodily integrity and control are substantial and remain so whether the employee is at home or at work. The fact that railroad employment is safety-sensitive does not reduce the reasonableness of these privacy expectations. Significant intrusions into employees' bodies, and direct supervision of urination are neither ordinary nor necessary practices in the railroad industry. These practices, therefore, cannot be justified as "operational realities" of the workplace, especially since legitimate safety needs of the railroad can be met by less intrusive means. (see *infra* 40-45).

¹⁵ We agree with Justice Scalia that the "identity of the searcher (police vs. employer) is relevant not to whether Fourth Amendment protections apply, but only to whether the search . . . is reasonable." *O'Connor v. Ortega*, 107 S. Ct. at 1505 (Scalia J., concurring).

Finally, there are no provisions to safeguard the confidentiality of the information obtained through the alcohol and drug testing. In addition to prosecutors, the information obtained through blood and urine testing is available to the railroads, the National Transportation Safety Board, and any parties in litigation, see 49 C.F.R. § 219.11(d). There are no provisions in the regulation that ensure confidentiality of the results, or to prevent access by members of the general public. This adds further to the intrusiveness of the tests, in that details of one's private life become involuntarily exposed to public view.¹⁶

The nonconfidentiality of the test results and the inadequacy of the hearing procedures may also raise a due process issue. The employee's only procedural right at the hearing is limited to question the reasons behind the employee's refusal to take the test. 49 C.F.R. § 219.213(c). However, there are numerous factual issues that should be determined, including, but not limited to, the reliability of the particular tests given, the specific chain of command for handling the test samples, qualifications of the individuals performing the tests, determination of what medication the employee had been taking that might have cross reacted with the sample and affected the test results, etc. Without allowing this type of information to be developed at the hearing, the employee may be wrongfully discharged from employment without due process.

¹⁶ Blood and urine tests can reveal a great deal of personal, physiological information, including various medical disorders or conditions, e.g. epilepsy, diabetes, depression, and pregnancy. See *Capua v. City of Plainfield*, 643 F. Supp. at 1513; Stille, *Drug Testing*, Nat'l L.J. at 23 (April 7, 1986). The regulations do not prevent a party from testing for such information.

2. The Closely Regulated Industry Exception To Particularized Suspicion Is Inapplicable To Drug And Alcohol Testing Of Railroad Workers Under The FRA Regulations.

In the courts below, the Petitioners argued that this case should be decided by the standards governing administrative searches (*see* Petitioners' Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 23-29; Petitioners' Appeal Brief at 18-23). The Petitioners now have apparently retreated from that argument. While they cite administrative search cases (Pet. Br. at 23), Petitioners realize that the Court has never applied the administrative search rationale to invasive searches of individuals. This probably is the last vestige of the Fourth Amendment that the Court deems inviolable -- an individual cannot be invasively searched without at least particularized suspicion.

The Petitioners argue that the Ninth Circuit erred in not properly balancing the competing interests under the closely-regulated industry exception to particularized suspicion (Pet. Br. 23-24). This position is untenable for the obvious reason that the closely-regulated industry exception is inapplicable to railroad employees, and that balancing under this exception is unnecessary. This Court has applied the closely-regulated industry exception *only* to searches of property, involving only minimal intrusions upon privacy, and consequently the exception does not extend to searches of persons. Moreover, even if the exception were extended to persons, it should not be applied in the present case because railroad workers are not a closely-regulated industry.

1. Analysis of the case history of the closely-regulated industry exception reveals that this type of administrative search has a property based rationale. In *Camara v. Municipal Court*, 387 U.S. at 537, the Court imposed an administrative search warrant requirement prior to inspection of a dwelling for possible housing code violations. The Court recognized that the searches were "neither personal in nature nor aimed at the discovery of evidence of crime." Moreover, the search

entailed a "relatively limited invasion of . . . privacy." *Id.* In *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970), the Court held that Congress could authorize administrative searches of locked liquor storerooms because the liquor industry has long been subject to close supervision and inspection. Subsequent decisions firmly establish that such administrative searches are justified by the lesser expectation of privacy persons have over *property* in a pervasively regulated industry. *See New York v. Burger*, 107 S. Ct. at 2643. In *Marshall v. Barlow's, Inc.*, 436 U.S. at 313 the Court, White J., wrote that "certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for the proprietor over the *stock* of such an enterprise." (emphasis added). The same reasoning compelled the Court's decision in *United States v. Biswell*, 406 U.S. 311 (1972). In upholding a warrantless search of a locked gun storeroom, the Court, White, J., wrote, "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business *records, firearms, and ammunition* will be subject to effective inspection." *Id.* at 316 (emphasis added).

The closely-regulated industry exception evinces the fact that one's expectation of privacy with respect to commercial property is naturally lesser than other expectations of privacy. Thus, while the Court has held that commercial property is entitled to Fourth Amendment protection, *See v. City of Seattle*, 387 U.S. 541, 545 (1967), the Court has also suggested that commercial property may reasonably be inspected in many more situations than private homes. *Id.* at 546. In *Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981), Justice Marshall said:

The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectations of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by

regulatory schemes authorizing warrantless inspections.

Accord South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (less rigorous warrant requirements govern automobile searches "because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office"). Thus, the more permissive administrative search doctrine is in fact an exception based on relatively attenuated privacy interests, and relatively unintrusive searches. Note, *Shoemaker v. Handel and Urinalysis Drug Testing: Looking For An American Standard*, 21 Georgia L.Rev. 467, 483 (1986).

For obvious reasons, invasive personal searches, such as those mandated and authorized by the FRA regulations, can be distinguished from searches of places and effects, and must be justified independently under the Fourth Amendment. See *Schmerber v. California*, 384 U.S. at 767-768 ("because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers . . . we write on a clean slate"); *Accord U.S. v. Crowder*, 543 F.2d 312, 322 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 1062 (1977) ("one's body simply cannot be equated with his car, his clothing, or even his home as a repository of evidence"); *Balelo v. Baldrige*, 724 F.2d 753, 767 (9th Cir.) (*en banc*), *cert. denied*, 104 S. Ct. 3536 (1984) (applied closely-regulated industry exception in allowing the placement of observers on fishing vessel, but held that personal searches had to be "justified independently"). Because privacy expectations are greatest with respect to one's own body, the closely-regulated industry exception should not be extended to personal searches. Moreover, because drug and alcohol tests of railroad employees are highly invasive, and can reveal evidence of a crime (see *supra* at 24), the scope of such administrative searches goes beyond that which was contemplated in *Camara*, 387 U.S. at 537.

2. Even if the closely-regulated industry exception were extended to personal searches, the exception should not be applied here because railroad employees are not a closely-regulated industry. In its most recent "closely-regulated

industry" case, *New York v. Burger*, 107 S. Ct. at 2643 (1987), the Court stated that "the doctrine is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy." (quoting *Donovan v. Dewey*, 452 U.S. at 605-606). The Court observed, however, that "'the duration of a particular regulatory scheme' would remain an 'important factor' in deciding whether a warrantless inspection pursuant to the scheme is permissible." *Id.*

Although railroads have long been subject to close regulation, railroad employees have not.¹⁷ Among the railroad safety statutes only the Hours of Service Act, the Hazardous Materials Transportation Act, and the Rail Safety Improvement Act of 1988 directly concern railroad employees, and none of these has the effect of reducing employees' expectations of privacy, as required by *Burger* and *Donovan*.¹⁸

¹⁷ Since 1893, Congress has enacted the Safety Appliance Act, 45 U.S.C. § 1 *et seq.*; the Block Signal Act, 45 U.S.C. § 35; the Ash Pan Act, 45 U.S.C. 17 (repealed by the Federal Railroad Safety Authorization Act of 1982, Pub. L. No. 97-468, Tit. VII, § 705, 96 Stat. 2580); the Accident Reports Act, 45 U.S.C. § 38; the Locomotive Inspection Act, 45 U.S.C. § 22; the Signal Inspection Act, 49 U.S.C. App. § 26; the Hours of Service Act, 45 U.S.C. § 61 *et seq.*; the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*; the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 *et seq.*; and, more recently, the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 624.

¹⁸ The decision of the Court of Appeals for the Third Circuit in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) is distinguishable on this point. The Third Circuit applied the administrative search exception to employees in the closely-regulated horse racing industry because the employees are the "principle regulatory concern." *Id.* at 1142. By contrast, the overwhelming majority of railroad regulations concern equipment and railroads themselves. Moreover, the testing scheme in *Shoemaker* included certain provisions which added to its reasonableness. Employees there had greater rights to contest the test results; the State agreed not to seek criminal prosecution of employees testing positive for illicit drug use; the selection of employees to be tested was made by lottery, thereby eliminating discretion; and officials and supervisors were also subject to testing. Of course, we submit that the decision of the court to extend the closely-

The Hours of Service Act merely prohibits a railroad from requiring or permitting an employee to work for more than 12 consecutive hours. 45 U.S.C. § 62. This hardly has the effect of reducing employees' privacy expectations. The Hazardous Materials Transportation Act, and regulations promulgated thereunder, 49 C.F.R. § 174.1-174.840, establish criteria for handling hazardous materials, require minimum levels of training and qualification for employees, and subject employees to civil penalties for violations. We are unaware, however, that there has ever been a case against an employee under any of these provisions. Given this fact, and the fact that the provisions are narrowly focused on the transportation and handling procedures for hazardous materials, employees can reasonably continue in their expectations of privacy over bodily functions.

The same can be said for the Rail Safety Improvement Act of 1988. This newly enacted law subjects railroad employees to civil penalties for willful violations of various railroad safety laws. Furthermore, the law requires the Secretary to promulgate rules regarding the licensing of locomotive operators, including engineers. While this latter provision is a direct regulation of railroad workers, it cannot be characterized as pervasive. First of all, it applies only to operators or engineers. Second, it is more closely related to an engineer's training and qualifications than to his conduct. Under the Act, the licensing program must provide minimum training requirements for engineers, require comprehensive knowledge of railroad operating practices and rules, and require consideration of the motor vehicle driving record of each individual seeking licensing. Licensing engineers in no way regulates such employees' on the job conduct. Neither the civil penalty provision nor the licensing provision is related to alcohol/drug regulations. Thus, railroad employees'

regulated industry exception to persons is constitutionally misguided, and must be rejected. See Note, *Shoemaker v. Handel and Urinalysis Drug Testing: Looking For An American Standard*, 21 Georgia L.Rev. 467 (1986).

expectations of privacy over their bodies and bodily fluids have not been affected by the new legislation.

In addition, the recent enactment of the Rail Safety Improvement Act, subsequent to the promulgation of the FRA rule and the commencement of this suit, clearly demonstrates that railroad employees do not have a history of direct governmental oversight. Since the length of close regulation is an important factor under *Burger*, 107 S. Ct. at 2643, and since the regulation of employees, *per se*, is not pervasive, the Court should not deem such employees a closely-regulated industry.

3. **There Are Inadequate Safeguards Available To Assure That The Railroad Employees' Reasonable Expectation Of Privacy Are Not Subject To The Discretion Of The Official In The Field.**

Contrary to the assertions by Petitioners, the railroad supervisory personnel are given great discretion in determining whether a test is to be conducted. The most obvious concern is that it is the railroad supervisor, and not a federal or state inspector, whose discretion is involved. The railroad supervisor alone determines whether the conditions precedent set out in the regulations have been met. This creates further potential for harassment,¹⁹ which is not present in searches by federal or state inspectors.

Under 49 C.F.R. § 219.201(a)(1) and (a)(2) the railroad supervisor is required to make an immediate on-the-scene evaluation as to the amount of property damage. He or she is given complete discretion to make such a judgment, even though there is no requirement in the rule that such person be trained in assessing monetary damages to equipment. The absurdity of the section is highlighted by the example of an accident which occurred on the Norfolk and

¹⁹ The recently enacted Rail Safety Improvement Act of 1988 (P.L. No. 100-342, 102 Stat. 624, acknowledges the continued existence of harassment problems in the railroad industry. (See sec. 5).

Western Railroad on May 18, 1986. There, the chairman and chief executive officer of the parent railroad was operating an excursion train at the time of a derailment. A total of 14 cars were damaged and there were 177 injuries in the accident. It is questionable whether anyone would tell the CEO of the railroad that he should undergo an alcohol or drug test. The President of the railroad, who was not even at the scene of the accident, determined that the dollar threshold for testing had not been met. Also, there was considerable confusion as to the identity of the appropriate senior official entrusted with the decision on whether or not to test. See National Transportation Safety Board Railroad Accident Report on Derailment of Steam Excursion Train Norfolk and Western Railway Company Train Extra 611 West, Suffolk, Virginia, May 18, 1986 (Rept. No. NTSB/AAR-87/05) at pp. 48-49. Another example of the wide discretion afforded officials in the field is seen in the aforementioned Arkansas accident (J.A. 137-139), in which tornado-like winds caused a train to derail. Though an act of God was clearly the cause of the derailment, a railroad official decided to test the entire train crew. (See J.A. 137-139; see also J.A. 141-146).

Another aspect of the rule which demonstrates lack of safeguards for the employee is that Subpart D allows testing based upon certain rule violations. See 49 C.F.R. § 219.301(b)(3). It is the supervisory personnel alone who determines whether or not the rule which triggers the test has been violated. Moreover, even under 49 C.F.R. § 219.301(b)(1), which satisfies a particularized suspicion standard, the supervisor needs to have only 3 hours of specialized training in detecting the signs of drug intoxication. See 49 C.F.R. § 219.301(c)(2)(ii). Greater training of supervisors is needed if unnecessary testing is to be curtailed.

The ultimate discretion is delegated to the railroads by allowing them to perform tests under any conditions they may wish. See 49 C.F.R. § 219.305(e). As a result of this provision, some railroads are mandating additional tests but not requiring confirmation, due to the additional expense involved. Moreover, the laboratories used are not of the highest calibre, thereby raising questions of reliability, and chain of custody problems preclude accurate identification of one's specimen. False positives can arise in several ways.

There are various urinalysis tests now being marketed. They are generally reliable, but no one can assert that any of them is infallible. Even a small error rate becomes significant when large numbers of samples are tested, such as in the railroad industry. A urine specimen may be mislabeled, mishandled, contaminated on the way to or at the drug testing laboratory itself, or possibly deliberately switched. All of these problems can and do exist without any constraints upon the railroads.

Because drug and alcohol tests entail significant intrusions into reasonable privacy expectations, and because there are insufficient safeguards to limit the discretion of the official in the field, the Court's decision in *T.L.O.* compels to conclusion that tests conducted in the absence of individualized suspicion are unconstitutional. See *T.L.O.*, 469 U.S. at 342, n.8. Suspicionless drug and alcohol testing is certainly an arbitrary governmental invasion, against which the Fourth Amendment was designed to protect.

A decision permitting suspicionless blood and urine testing of railroad workers following accidents, incidents, or rule violations would completely eviscerate the Fourth Amendment. Such a decision logically would permit suspicionless testing of motorists and vehicle occupants following accidents or motor vehicle violations. Similarly, governmental regulation of the private sector workplace could permit testing after any accident or minor rule violation. Moreover, such a decision would permit the anomaly of providing greater Fourth Amendment protections to criminals than to law abiding citizens. See *Camara*, 387 U.S. at 530.

D. The FRA Regulations Do Not Serve Compelling Governmental Interests

As previously stated (*supra* at 1-2), Respondents do not question that the government should secure the safety of the public and employees by preventing alcohol and drug impairment. However, we differ strongly in the method employed to reach this worthy goal.

The "compelling governmental interests" argument by the Petitioners fails when it is compared to other interests such

as the ever present concerns with crime -- which, of course, requires probable cause for searches. If governmental interests were the criterion for personal searches which did not require individualized suspicion, then the Fourth Amendment would lose all vitality. The Court has determined that the government must show more. See *O'Connor v. Ortega*, 107 S. Ct. at 1500 (plurality opinion) and 1506 (opinion of Scalia, J., concurring); *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

The Petitioners' justification for their alleged "compelling governmental interests" are (1) the deterrent effect of the regulations (Pet. Br. 38), (2) the testing would permit the agency to determine with greater precision the causes of major accidents (Pet. Br. 39) and (3) that the FRA is not required to adopt less intrusive alternatives. (Pet. Br. 39). Each of Petitioners' arguments is flawed.

1. The Regulations Will Not Result In Any Greater Deterrence

It is a hotly debatable point whether the regulations actually deter alcohol and drug usage. It is just as valid to assert that the regulations do not really create any greater deterrence. We are unaware of any recognized studies which demonstrate that compulsory toxicological testing is a deterrent to use. An employee who is not already deterred by the risk of an accident while impaired is not likely to be deterred by the risk of a post accident test. The truth is that alcohol and drug users do not believe they will be caught by any web of testing.

Based on the Petitioner's rationale, any testing that deters, no matter how invasive or intimidating, would be constitutional. If that were the criterion, the entire U.S. workforce and all motorists could be tested after any random event such as an accident or rule violation. It may have some deterrent effect, but the cost of any alleged deterrence in terms of constitutional rights is excessive. As pointed out in *Patchogue-Medford Congress of Teachers v. Board of Education*, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) "... [i]f random searches of those apparently above suspicion were not effective, there would be little need to place constitutional limits upon the government's power to do so."

There comes a point at which searches intended to serve the public interest, however effective, may themselves undermine the public's interest in maintaining the privacy, dignity, and security of railroad workers. The FRA regulations far exceed that point. A testing program which inflicts a substantial invasion of privacy on the thousands of employees in order to allegedly deter conduct of a few must be deemed overly intrusive and unconstitutional.

2. Obtaining Better Data Concerning Causes of Accidents Does Not Justify Invasive Testing

The Petitioners' next contention *i.e.* the FRA will obtain better data concerning causes of accidents, does not justify invasive testing based upon nonparticularized suspicion either. The cause of railroad accidents can be determined by lesser intrusions (*see infra* 40-43), and still reliable evidence can be gathered concerning its cause. We do not question that the public interest justifies determining the cause of each railroad accident. Rather, the issue is whether the government is prevented from ascertaining the cause of an accident if particularized suspicion is required before a search is permitted. It clearly is not if the other less intrusive means identified in this brief are adopted. Also, *Schmerber v. California*, 384 U.S. at 770 teaches us that:

... human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

A parallel exists here with respect to officials seeking to determine the cause of a recent fire. In *Michigan v. Clifford*, 446 U.S. 287, 294 (1984) the Court said that "If the primary object is to determine the cause and origin of a recent [accident], an administrative warrant will suffice." Once the

railroad accident or rule violation which triggers the test has occurred, the exigent circumstances are over.

Thirdly, the Petitioners argue that adoption of less intrusive means is not required, and that its examination of other options were found to be wanting (Pet. Br. 39). It may be that the alternative referred to in its Brief at 5-6 and fn. 6 alone may not be the answer. However, when combined with the approaches suggested herein, then the public interest for a safe railroad system free from alcohol and drugs can be achieved.

3. The Regulations Must Be More Narrowly Drawn Because Drug And Alcohol Testing Infringes Upon Fundamental Constitutional Rights.

The Court has stated that the "reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). This is in recognition of the fact that "creative judge[s], engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States v. Sharpe*, 470 U.S. 675, 686-687 (1985)). Nevertheless, case law clearly reflects that the existence of less intrusive means is an important factor to consider in determining the reasonableness of governmental action.

The Court has held that, despite a substantial state interest, "if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference," but "must choose 'less drastic means.'" *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1961)). See also *Roe v. Wade*, 410 U.S. 113, 115 (1973).

The Court has repeatedly stated that Fourth Amendment searches may not be overly broad in scope. In *Terry v. Ohio*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)), the Court held that the scope of a pat-down search "must be 'strictly tied to and justified by the circumstances which rendered its initiation permissible.'" Cf. *New Jersey v. T.L.O.*, 469 U.S. at 341 (requiring that searches of students by school officials be reasonably related in scope to the circumstances which justified the search); *O'Connor v. Ortega*, 107 S. Ct. at 1503. This analysis has been followed by several lower courts in the same context. Regarding airport screening searches, the Court of Appeals for the Ninth Circuit stated that the legitimate and substantial governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1961)). Regarding courthouse magnetometer searches, the Ninth Circuit stated that the "search must be limited and no more intrusive than necessary to protect against the danger to be avoided . . ." *McMorris v. Alioto*, 567 F.2d 897, 899 (9th Cir. 1978). The court, Kennedy, J., upheld the search because, *inter alia*, the inspection "was conducted in the least intrusive manner possible." *Id.* at 900. Regarding drug testing of correctional institution employees, the U.S. District Court for the Southern District of Iowa held that such searches "must be guided by some appropriate standards, and must be no more intrusive than is reasonably necessary." *McDonnell v. Hunter*, 612 F. Supp. 1122, 1128-1129 (S.D. Iowa 1985), *aff'd.*, 809 F.2d 1302 (8th Cir. 1987).²⁰

In addition to the infringement upon railroad employees' Fourth Amendment right to be free from unreasonable searches and seizures, the regulations

²⁰ Even in the context of closely regulated industries, where searches may be conducted on less than individualized suspicion, the Court has required that the regulatory searches be narrowly drawn. Thus, in *New York v. Burger*, 107 S.Ct. 2636, 2644 (1987) (quoting *Donovan v. Dewey*, 452 U.S. at 600), the Court required that the warrantless inspections be "necessary to further [the] regulatory scheme." (emphasis added).

impermissibly slight their fundamental constitutional rights to liberty and privacy. It is beyond dispute that liberty is a fundamental right. Recognized as an "inalienable right" in the Declaration of Independence, liberty subsequently became an integral part and essential concept of the Bill of Rights. As stated by the Court in *Terry v. Ohio*, 392 U.S. at 9 (quoting *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891)):

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Despite the lack of explicit mention in the Constitution, the Court has recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. at 152.²¹ These privacy aspects, and the railroad workers' liberty interests, constitute rights which are "fundamental" and "implicit in the concept of ordered liberty." *Id.*; see *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). As such, the Court's decisions in *Roe v. Wade* and *Dunn v. Blumstein* require that the FRA regulations be narrowly drawn, and no more intrusive than necessary.

There are presently available a number of less drastic and equally effective means to address the legitimate governmental concerns, while at the same time not unduly

²¹ One noted commentator, Professor Philip B. Kurland, identifies at least three facets of the largely undefined privacy right: "The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from government compulsion." Kurland, *The Private I*, University of Chicago Magazine 7, 8 (autumn 1976) (quoted in *Whalen v. Roe*, 429 U.S. 589, 599, n.24 (1977)).

depriving innocent railroad employees of their constitutional rights. For example:

(a) Rule G, in effect on virtually every railroad, prohibits the possession or use of alcohol or drugs. This rule evinces the railroads' efforts to combat alcohol and drug use through traditional disciplinary methods.

(b) Second, there are voluntary co-operative agreements between the employees and major carriers which have shown to be very effective in reducing alcohol and drug use on the railroads. These programs are identified as Employee Assistance Programs and/or Operation Redblock. For example, the Brotherhood of Locomotive Engineers and the United Transportation Union in cooperation with railroads have responded to the alcohol and drug issue by a five-step drug and alcohol prevention program. (See J.A. 111-112). Although the FRA in its rulemaking described these various cooperative programs, see 50 Fed. Reg. 31,510 (August 2, 1985); 48 Fed. Reg. 30,723-30,732 (July 5, 1983); 49 Fed. Reg. 24,266-24,271 (June 12, 1984), the agency failed to adequately analyze the plans' effectiveness. Some major railroads presented documentation in the rulemaking record which clearly demonstrated that the voluntary programs were working. See *In Re: Control of Alcohol and Drug Use In Railroad Operation, Advance Notice of Proposed Rulemaking, Docket No. RSOR-6: Hearings Before the Federal Railroad Administration*, September 1, 1983, 273-282 (statement of Darrell Sorenson, Dir. of Employee Assistance Program, Union Pacific Railroad); *Hearings*, September 2, 1983, 123-133 (statement of William F. Howe, Vice-President of Casualty Prevention and Glen P. Michael, Assistant Vice-President for Labor Relations, Chessie System Railroads).

(c) Other less intrusive means include those aimed at improved detection. On October 10, 1986, the Secretary hailed a program developed by the Los Angeles Police Department as a potential breakthrough in the detection of drug-impaired persons. (J. A. 173). A laboratory evaluation of this program, conducted at Johns Hopkins University, and jointly sponsored by the National Institute on Drug Abuse and DOT's National Highway Traffic Safety Administration, showed that the police officers were over 98 percent accurate

when they identified a subject as having taken a drug. (J. A. 174). A follow-up field study determined that the LAPD drug recognition procedure "enables the experienced police officer to accurately recognize the symptoms of many types of drug use by drivers." (J. A. 182-183). This type of program, if instituted on the nation's railroads, would accomplish the government's goal of detecting impaired employees without subjecting innocent employees to more invasive blood and urine tests.²²

(d) Additional detection methods, which require far less training and are easier to administer, include those currently being used by police nationwide to test for impairment. Such roadside sobriety tests, as well as the aforementioned LAPD procedure, are less intrusive because they do not require providing blood, breath, or urine samples; they do not require time consuming transport to medical facilities, and the restraint of liberty which that entails; and they do not require tested individuals to reveal legitimate drug intake as a precaution against false positives in fluid testing. Such testing would be an effective method in determining which railroad employees are obviously not impaired, and which employees should be subjected to more intrusive blood or urine tests.²³

(e) Another less intrusive means would be for the FRA to require railroad supervisory personnel to observe crew members when they go on and off duty. Supervisors can be trained to effectively detect employees who are impaired by drug or alcohol use without resorting to such intrusive procedures

²² The LAPD drug evaluation procedure consists of three relatively unintrusive components: an interview concerning the suspect's medical history; measuring physiological symptoms such as pulse rate, pupil size, etc.; and behavioral tests designed to assess psychomotor performance. (J.A. 179-180).

²³ For an example of a typical roadside sobriety test, see Wingleth & Stevens, *Evidentiary Aspects of Alcohol Ingestion*, in *Handling the D.U.I. Case* (1980) (published by Continuing Legal Education in Colorado, Inc., and the Colorado Bar Association Committee on Alcohol-Related Problems) (quoted in *People v. Carlson*, 677 P.2d at 316-317).

as blood and urine tests. *See Taylor v. O'Grady*, 669 F. Supp. at 1432. Supervisors, with limited training, could also conduct the above-mentioned sobriety test upon any employee whose appearance or behavior merits further investigation. *See Id.* at 1433. Blood or urine samples could then be required of any employee who fails a sobriety test. This would have the effect of transforming all testing into reasonable suspicion testing, as to which the Respondents have no dispute. Moreover, this would have a tremendous deterrent effect on drug users, thereby fulfilling another FRA purpose in testing.

These less intrusive means, or a combination thereof, would be very effective in detecting drug or alcohol impaired employees, and in deterring alcohol or drug use on the job. Because the FRA did not adopt these alternatives, the regulations are not narrowly drawn. For this reason, 49 C.F.R. Part 219 violates the Constitution.

E. The Implied Consent Specified In 49 C.F.R. § 219.11 Cannot Validate An Otherwise Unreasonable Search.

a. The Court has rejected the theory that public employment which may be denied altogether may be subjected to unreasonable conditions. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *see also Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926) (if the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all). Several lower courts have relied upon this reasoning to hold that a search otherwise unreasonable cannot be redeemed by a public employer's exaction of a "consent" as a condition of employment. *See RLEA v. Burnley*, 839 F.2d at 589; *National Federation of Federal Employees v. Weinberger*, 818 F.2d at 942; *Lovvorn v. City of Chattanooga*, 846 F.2d at 1548; *McDonnell v. Hunter*, 809 F.2d at 1310; *Cf. Farris v. United States*, 24 F.2d 639, 640 (9th Cir.) *cert. denied*, 277 U.S. 607 (1928) (search of a dwelling house without a warrant, though without objection by owner, held unlawful).

Logically, this same reasoning extends to the implied consent specified in 49 C.F.R. § 219.11. Although railroad workers are private sector employees, the government is imposing conditions on that employment by implying consent to drug tests. Such an exaction impermissibly compels the surrender of railroad workers' Fourth Amendment rights. As expressed in *McDonell v. Hunter*, 809 F.2d at 1310, "Advance consent to future *unreasonable* searches is not a reasonable condition of employment." (emphasis in original). For this reason, the Court of Appeals was correct in stating that a constitutionally unreasonable search cannot be saved by DOT's implied consent requirement. 839 F.2d at 589.

b. It is well-settled that a search conducted pursuant to a *valid* consent is constitutionally permissible. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Katz v. United States*, 389 U.S. at 358 (emphasis added). It is equally well-settled, however, that consent, to be valid, must be freely and voluntarily given. See *Schneckloth*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The Fourth Amendment requires that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. *Schneckloth*, 412 U.S. at 228. Analogizing to cases of forced confessions, Justice Stewart in *Schneckloth* wrote: "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?" 412 U.S. at 225 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

In the context of railroad workers and 49 C.F.R. § 219.11, the answer to this question, clearly, is no. An employee who chooses not to provide a blood or urine sample following an accident or incident will be disqualified and withdrawn from covered service for a period of nine months. 49 C.F.R. § 219.213. The coercive effect of this penalty is manifest. The DOT has suggested that employees can avoid exposure to the searches by leaving covered service altogether. (Petitioner's Appeal. Br. 40). This is simply not a reasonable choice to place on employees, many of whom have spent a lifetime building a career in covered service, and for whom re-employment elsewhere in a similar position would be

impossible. An option to provide blood or urine samples or to effectively lose your job is no choice at all. As stated by Justice Douglas in the analogous case of *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (wherein police officers were questioned and threatened with removal from office for refusal to answer), "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."

Because consent is not freely given, and is the product of unreasonable pressure, the implied consent specified in 49 C.F.R. § 219.11 violates the Fourth Amendment.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:

HAROLD A. ROSS
General Counsel
Brotherhood of
Locomotive Engineers
The Standard Building
1370 Ontario Street
Cleveland, Ohio

CLINTON J. MILLER, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

LAWRENCE M. MANN*
Alper & Mann
Suite 811
400 First Street, N.W.
Washington, D.C. 20001

W. DAVID HOLSBERRY
Davis, Cowell & Bowe
100 Van Ness Avenue
9th Floor
San Francisco, CA 94102
Attorneys for Respondents

*Counsel of Record

APPENDIX

OPENING STATEMENT

FOR

THE HONORABLE JOHN D. DINGELL

CHAIRMAN

**SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS**

Wednesday, July 27, 1988

Today, the Subcommittee will examine the capability of clinical laboratories to establish and maintain the standards necessary to assure the utmost in accuracy, reliability, security, and confidentiality. This Subcommittee has legislative oversight responsibility for health and health facilities.

The Rules of the House require us to examine whether existing laws and regulations are adequate and are being adequately enforced. If the answers to the Subcommittee's questions today show they are not, then we must examine how we can insure that tests are fairly conducted, their results are accurate, and the public health and welfare is promoted.

Accidents involving substance abuse as a possible contributing cause are increasing. Productivity in the workplace is being lost because of alleged drug and substance abuse. The response of business and industry to this crisis has been overwhelming. More and more companies are implementing drug testing programs in an effort to stem the use of illegal drugs by their workforce.

Although drug testing has been ongoing for almost ten years, private labs conducting drug tests remain uniquely

unregulated. Many in the laboratory industry are quick to assure the Subcommittee that the threat of litigation and the standards recently promulgated by the National Institutes of Drug Abuse to regulate labs testing Federal employees will sufficiently police the drug testing laboratory industry. This argument is as convincing as the Defense Department's assurances that self policing will eliminate waste, fraud, and abuse among the national defense contractors. We know what happened there.

In a highly competitive industry without regulations or requirements, cost is the primary determinant of selection, and the lowest bidder will prevail. Unfortunately, when costs are cut, quality usually suffers as higher volume is demanded, and capital equipment and manpower is maximized, often beyond prudent levels. In the drug testing industry, a high degree of professional competence, concentration, and skill is essential because poor testing has the potential to profoundly affect the public. This very lack of control is the catalyst for, at best, a national embarrassment and, at worst, a disaster.

Today, we will examine two cases involving employees in the private sector who allege that drug testing improperly found them guilty of drug use.

-- Collette Clark, a data entry operator with the San Diego Gas and Electric Company, lost her job after her drug test showed positive for marijuana. Only after Ms. Clark filed a lawsuit and obtained services of an attorney, was it determined that not only were the results of her tests invalid, but the confirmatory test, which the laboratory claimed it conducted, was, in fact, never done.

-- Alan Pettigrew, an employee with Southern Pacific Transportation, was required to undergo a month's rehabilitation for what he alleges was an incorrect result on a drug test. Only after three years of litigation was his case against his employer settled. Mr. Pettigrew claims that the cost to his family and to himself was and still is devastating. Although his employer maintains that it was satisfied with the results of his initial test, records show a gap in the chain of

custody of his urine sample at least one of the two laboratories which conducted his urine test.

We suspect there are a vast number of others who have neither the resources nor the knowledge to seek legal assistance or to pursue remedies that might vindicate them.

We will also look at the way employers use lab testing. In the two cases under review today, both selected what they considered reputable labs. Amazingly, no contract was in place to assure Ms. Clark's employer that the laboratory would perform the tests as agreed. In Mr. Pettigrew's case, one of the laboratories has reported to the Subcommittee that Southern Pacific elected not to ask for a chain of custody. An expert witness has testified in private litigation that no record of the proper chain of custody existed and the interpretations were not reliable.

Other witnesses, today, will testify to the current state of drug testing. We will hear from forensic toxicologists and pathologists who have observed that many laboratories are not equipped, nor do they understand the controls necessary to handle forensic drug testing standards. Many laboratories cannot or will not invest resources to maintain properly secured facilities, qualified personnel, testing methodologies, quality assurance, documentation, and interpretation of analysis results.

We will also hear from an attorney who has represented over 600 servicemen whose drug test results were questioned and found invalid due to improper procedures. The laboratory which conducted these drug tests is considered one of the foremost forensic drug testing laboratories in the country. If the test on 600 servicemen were questionable, what can we expect from the hundreds of unlicensed and unregulated laboratories conducting drug tests?

We also hope to learn more about how business seeks a laboratory to test its employees or applicants. We will hear testimony today showing how the lack of technical expertise among businesses is a widespread and fundamental problem in drug testing. There seems to be a disturbing detachment among companies related to the laboratories they engage.

Many rely on the limited expertise of untrained human resource or medical personnel to select a laboratory. This can and frequently has had devastating effects on their employees.

Our final two witnesses take us into the operations of one of the nation's largest laboratories. National Health Laboratories is one of the top six laboratories in the country and currently provides drug screening services for a number of companies. It currently conducts approximately half a million drug screening tests a year. Ms. Dolly Scott, a former National Health Laboratories employee, is expected to testify that quality problems in numerous areas of clinical testing, including drug tests, were widespread and unchecked in its San Diego facility. Her testimony raises disturbing questions about the capability of clinical laboratories to conduct both clinical and forensic drug tests.

Our last witness, Mr. Robert Draper, President of one of the nation's largest laboratory chains, will testify that National Health Laboratories has devoted extensive resources to quality control among the 15 major laboratories within NHL. In fact, he points out that NHL, to his knowledge, is a leader in assuring quality control within the laboratory industry. If that is the case, then our proposed legislation, which addresses minimal quality assurance, is coming none too soon.

(10)
No. 87-1555



In the Supreme Court of the United States

OCTOBER TERM, 1988

**JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS**

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

22 pgs

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	9
<i>Cady v. Dombrowski</i> , 413 U.S. 433 (1973)	13
<i>Colorado v. Bertine</i> , 479 U.S. 367 (1987)	13
<i>Consolidated Rail Corp. v. Railway Labor Executives' Ass'n</i> , No. 88-1 (cert. granted, Oct. 3, 1988)	16
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981)	5
<i>Illinois v. Lafayette</i> , 462 U.S. 640 (1983)	13
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954)	17
<i>McMorris v. Alioto</i> , 567 F.2d 897 (9th Cir. 1978)	2
<i>Michigan v. Clifford</i> , 464 U.S. 287 (1984)	6
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	2, 3, 5, 12
<i>New York v. Burger</i> , No. 86-80 (June 19, 1987)	6
<i>Rushton v. Nebraska Public Power Dist.</i> , 844 F.2d 562 (8th Cir. 1988)	6
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	5
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986)	6
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	3
<i>United States v. Davis</i> , 482 F.2d 893 (9th Cir. 1973)	2
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976) ...	2, 7, 8, 13
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)	17
<i>United States v. Montoya de Hernandez</i> , 473 U.S. 675 (1985)	13
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985)	13
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976)	17
Constitution, statutes, regulations and rules:	
U.S. Const. Amend. IV	6
Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III) 421 <i>et seq.</i>	16
45 U.S.C. (& Supp. III) 431(a)	16, 17
Hours of Service Act 45 U.S.C. 61 <i>et seq.</i> :	
45 U.S.C. 61-64b	15
Railway Labor Act, 45 U.S.C. 151 <i>et. seq.</i>	9, 16

II

Rules and regulations — Continued:

Page

49 C.F.R.:

Rule 219.1(a)	7
Rule 219.9(a)(3)	9
Rule 219.9(a)(5)	9
Rule 219.201(a)(1)	7
Rule 219.201(c)	9
Rule 219.203(a)(2)	8
Rule 219.203(a)(3)(i)	8
Rule 219.211(a)(2)	9
Rule 219.213	9

Sup. Ct. R. 21.1(a)	17
---------------------------	----

48 Fed. Reg. 30723 (1983)	14
---------------------------------	----

49 Fed. Reg. (1984):

p. 24266	14
p. 24267	14
p. 24281	14
p. 24286	15
p. 24291	12

50 Fed. Reg. (1985):

p. 31527	14
p. 31530	15
p. 31531	9
p. 31542	8
pp. 31542-31543	16
p. 31543	15
p. 31544	15
p. 31555	4

53 Fed. Reg. (1988):

p. 16640	4
p. 16650	4

Federal Rule Evid. 401	12
------------------------------	----

Miscellaneous:

115 Cong. Rec. 40205 (1969)	17
Federal Railroad Admin., U.S. Dep't of Transp., <i>Field Manual: Control of Alcohol and Drug Use in Railroad Operation D-5</i> (Mar. 1986)	4

III

Miscellaneous — Continued:

Page

<i>Federal Railroad Safety Act of 1969: Hearings on S. 1933, S. 2915, and S. 3061 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 91st Cong., 1st Sess. (1969)</i>	17
<i>H.R. Rep. 91-1194, 91st Cong. 2d Sess. (1970)</i>	16
<i>Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11979 (1988)</i>	4
<i>S. Rep. 91-619, 91st Cong., 1st Sess. (1969)</i>	17

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

Respondents defend the court of appeals' decision in this case by embracing all of its principal errors. Like the court below, respondents presume, without balancing the competing interests, that a search cannot be constitutional in the absence of particularized suspicion. Like the court below, respondents overstate the privacy interests at stake, chiefly by ignoring, or misconstruing, the regulated nature of the industry and its employees. And like the court below, respondents minimize the compelling government interest in railroad safety, by asserting without evidence that the FRA regulations do not advance that interest and by proposing in their place a litany of "less drastic" alternatives.

1. Respondents acknowledge that the constitutionality of the FRA regulations "is governed by th[e] * * * test of 'reasonableness under all the circumstances' " (Br. 17,

citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (citation omitted)). They recognize, moreover, that “the determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails’ ” (Resp. Br. 15, quoting *T.L.O.*, 469 U.S. at 337). But having set out the appropriate framework, respondents, like the court below (Pet. App. 25a), then bypass the balancing test altogether. Relying entirely on *T.L.O.* (see Resp. Br. 17-19), respondents assert that to conduct a testing program that is constitutional under the Fourth Amendment, “a railroad [must] have reasonable grounds for suspecting that the search will turn up evidence of a violation” (Br. 19).

This Court did not establish any such hard-and-fast rule in the *T.L.O.* case. Although the Court found, on that particular record, that there were reasonable grounds to believe that the search of the student’s handbag would turn up relevant evidence, the Court made clear that it was not “decid[ing] whether individualized suspicion is an essential element of the reasonableness standard [it] adopt[ed] * * * ” (469 U.S. at 342 n.8). In fact, the Court emphasized, while “ ‘some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion’ ” (*ibid.*, quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976)).¹ And the Court suggested that “[e]xceptions to the

¹ Indeed, if there were such an irreducible requirement of individualized suspicion, it would call into question such widespread security measures as magnetometer searches of airline passengers and persons entering a courthouse. See, e.g., *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978); *United States v. Davis*, 482 F.2d 893, 913-914 (9th Cir. 1973).

requirement of individualized suspicion” might be made “where the privacy interests implicated by a search are minimal and where ‘other safeguards’ are available ‘to assure that the individual’s reasonable expectation of privacy is not “subject to the discretion of the official in the field” ’ ” (*ibid.* (citations omitted)). For the reasons stated in our opening brief, we believe that the FRA regulations amply satisfy that standard of reasonableness.²

2. Respondents contend (Br. 21-35) that the FRA regulations infringe upon “significant privacy interests” (Br. 21). In particular, they assert, “[t]o the individual being tested, there are distinct feelings of humiliation, offensiveness, anger, distrust, distress, emotional pain, concern, apprehension, and anxiety over errors” (*ibid.*).

a. Respondents’ concerns are in part rooted in their mistaken assumption that “each urine sample [must] be

² Respondents contend (Br. 15 n.6) that even if the Court were to reject the particularized suspicion requirement in this case, the FRA regulations would nonetheless be unconstitutional because they “cannot satisfy the two prong test of *New Jersey v. T.L.O.*, that the searches are justified at the inception and reasonably related in scope to the circumstances which justified the search.” Respondents appear to believe that the “two prong test” articulated in *T.L.O.* imposes its own requirement of particularized suspicion, wholly apart from what the balance of competing interests otherwise suggests. That is a plain misreading of the case. In stating that a search must be “ ‘justified at its inception’ ” and “ ‘reasonably related in scope’ ” (469 U.S. at 341, quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)), the Court did not purport to establish any base-line standard of reasonableness. Rather, the “test” in *T.L.O.* simply requires that a search be “justified” and “reasonable” according to the standard of reasonableness entailed by the balance of relevant interests (see 469 U.S. at 337). Indeed, the *Terry* case, from which the *T.L.O.* “two prong test” derives, uses that test simply to frame the balancing inquiry, not as a proxy for the particularized suspicion standard (or any other standard) of reasonableness. See *Terry*, 392 U.S. at 19-28.

provided under the 'direct observation' of technicians" (Br. 5; see also Br. 23). In support of that claim, respondents cite (Br. 5, 23) a passage in the FRA *Field Manual*—governing Subpart D, but not Subpart C—that suggests that urine should be collected "[u]nder direct observation" (Federal Railroad Admin., U.S. Dep't of Transp., *Field Manual: Control of Alcohol and Drug Use in Railroad Operation D-5* (Mar. 1986) [hereinafter *Field Manual*]). The preamble to the FRA regulations explains, however, that while "observation is the most effective means of ensuring that the sample is that of the employee and has not been diluted," the final rule "does not require observation of sample collection." 50 Fed. Reg. 31555 (1985). The *Field Manual*, moreover, as its language makes clear, provides only "one means of achieving positive control over specimen collection," and it recognizes that "[o]ther methods of control are equally suitable" (*Field Manual* at D-1). Accordingly, the *Field Manual* offers several alternatives to "direct observation," including checking the sample for temperature, color, pH balance, specific gravity, and dilution (*id.* at D-5; see also *id.* at B-15). In short, the procedures identified by respondents "are not intended to * * * constitute federal requirements" but rather "are suggestions based on extensive experience that can assist in properly documenting a urine test result" (*id.* at D-1 to D-2).³

³ On May 10, 1988, the FRA issued a Notice of Proposed Rule-making (53 Fed. Reg. 16640) that, when final, will incorporate (see *id.* at 16650) in Subpart D of the FRA regulations substantial portions of the regulations issued by the Department of Health and Human Services for all federal employee drug-testing programs. See *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, 53 Fed. Reg. 11979 (1988) [hereinafter HHS Reg.]. Included among the incorporated regulations—which are expected to take effect within several months—is HHS Reg. § 2.2(f)(7), which entitles an employee to provide his specimen in the privacy of a stall.

b. Respondents also find the FRA testing offensive because they reject what they term "the closely-regulated industry exception to particularized suspicion" (Br. 28). That mistakes the nature of our contention. We do not assert that the regulated nature of the railroad business creates an "exception" to the particularized suspicion standard. Rather, the regulatory framework reduces employees' expectations of privacy and, in that way, significantly affects the Fourth Amendment balance of interests. Railroad operating personnel, as we explained at length in our opening brief (at 26-30), work in an industry that has historically taken aggressive measures, both privately and through government action, to regulate in furtherance of railroad safety. Employees in that industry "cannot help but be aware that [they] 'will be subject to effective inspection.'" *Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (footnote and citation omitted).

There is no reason to discount the regulatory framework, as respondents urge (Br. 28-29), simply because this case involves the search of a person, rather than the search of property. We acknowledge, of course, that "[t]he integrity of an individual's person is a cherished value of our society" (*Schmerber v. California*, 384 U.S. 757, 772 (1966)), and that the search of a person may be "a severe violation of subjective expectations of privacy" (*T.L.O.*, 469 U.S. at 338). But "the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable" (*ibid.*); and, as Justice Powell explained in his concurring opinion in *T.L.O.*, the reasonableness of a person's expectations—even with respect to personal searches—will depend, in part, on the "environment" in which he works (see *id.* at 348 (Powell, J., concurring)). Recognizing that principle, two courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has

reduced employees' expectations of privacy. See *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant engineers); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (race track employees). Because the railroad industry, and those who work in it, are likewise subject to substantial public and private regulation—the latter of which respondents do not address—operating employees have a reduced expectation of privacy as against measures designed to promote railroad safety.

c. The FRA regulations are not unduly intrusive simply because they do not “prevent a prosecutor from gaining immediate access to blood and urine samples, or to test results, for use in a criminal proceeding” (Br. 24). This Court rejected a similar claim in *New York v. Burger*, No. 86-80 (June 19, 1987). At issue in *Burger* was the constitutionality of a state statute authorizing police officers to enter automobile junkyards, without a warrant or particularized suspicion, and to examine the owner's business records. The lower court had invalidated the statute under the Fourth Amendment because it authorized searches “solely to uncover evidence of criminality” (slip op. 20 (citation omitted)). This Court reversed, recognizing that “both administrative and penal schemes can serve the same purposes” (*id.* at 20-21).⁴ The Court observed that the searches at issue promoted the stated regulatory purposes of the statute (*id.* at 23), and it rejected the proposition that “this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself” (*id.* at 24). As the Court concluded, “[t]he discovery of evidence of crimes in the course of an other-

⁴ See *T.L.O.*, 469 U.S. at 341 n.7; *Michigan v. Clifford*, 464 U.S. 287, 294 (1984).

wise proper administrative inspection does not render that search illegal or the administrative scheme suspect” (*ibid.*).⁵

The same principle applies here. The FRA has mandated urine and blood testing, not to assist in the prosecution of employees but rather “to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs” (49 C.F.R. 219.1(a)). The fact that the government may separately pursue criminal charges does not detract from the administrative nature of the FRA regulations.

d. Respondents also find the FRA regulations intrusive because, in their view, “railroad supervisory personnel are given great discretion in determining whether a test is to be conducted” (Br. 33). There is, to be sure, *some* element of discretion in just about everything employers do, and the testing program mandated by the FRA is no exception. For example, under Subpart C the employer must decide whether a fatality has occurred, whether hazardous material has been released, or whether there has been damage to railroad property amounting to \$500,000 or more (49 C.F.R. 219.201(a)(1)). But those judgments, and the others mandated by the regulations, hardly involve what respondents call “great discretion,” any more than did the discretion of Border Patrol officials in selecting the checkpoint locations in *United States v. Martinez-Fuerte*, 428 U.S. 543, 559-560 n.13 (1976) (upholding the routine stopping of vehicles at permanent checkpoints, in the absence of particularized suspicion).⁶

⁵ Contrary to respondents' suggestion (Br. 24), the Court's decision on this issue was not dicta, but a square rejection of the lower court's holding.

⁶ As an “example of the wide discretion afforded officials” under the regulations, respondents cite an “Arkansas accident * * * in which

Respondents contend, however, that even this limited amount of discretion may be abused, because there is a possibility of "harassment" by employers (Br. 33 (footnote omitted)) and testing errors by the laboratory (Br. 34).⁷

tornado-like winds caused a train to derail" (Br. 34). The FRA explained at the time, however, that for two reasons the regulations could not make exceptions "for acts of God" (J.A. 165). First, "it is nearly always difficult to determine accurately and quickly what caused, or contributed to the severity of, a major train accident" (*ibid.*). A blanket exception for accidents caused by severe weather conditions would therefore be difficult to apply. Second, "[e]ven in the case of a derailment of a portion of a train caused by a tornado, proper observation of weather conditions and coordination of train and locomotive brakes may in some cases prevent a larger and more costly derailment. Absence of toxicological testing may leave unanswered one key question about the fitness of the crewmembers." *Id.* at 165-166. In any event, the Arkansas incident reveals how the FRA regulations confine, not expand, the employer's discretion to determine who and when to test.

⁷ Respondents also contend (Br. 22) that "the test under the FRA rule is founded on distrust, and stigmatizes the employee as a suspected law breaker." Respondents do not explain that assertion, and in our view they "overstate the consequences" of the testing process (*United States v. Martinez-Fuerte*, 428 U.S. at 560). Under Subpart C of the regulations, a covered employee is subject to post-accident testing only when certain objective criteria, relating solely to the accident or incident, have been met. The triggering events were selected, not to "stigmatize" employees as "law breaker[s]," but because each of those events was "of substantial public interest" and represented an "accident[]" for which, based on FRA's experience, causal determination is often extremely difficult." 50 Fed. Reg. 31542 (1985). What is more, except in unusual cases, every operating employee aboard the train involved in the accident must be tested (see 49 C.F.R. 219.203(a)(2), 219.203(a)(3)(i)). That across-the-board testing requirement reduces to a minimum any sense that an employee has been singled out for drug and alcohol testing. Similarly, under Subpart D, although employees may sometimes be singled out for testing, it is only because some objective criterion, such as responsibility for the severity of an accident, has been satisfied.

But the FRA took considerable measures to guard against those possibilities. A railroad that requires post-accident testing in bad faith (see 49 C.F.R. 219.201(c)), or that willfully imposes a program of authorized testing that does not comply with Subpart D (see *id.* § 219.9(a)(3)), or that otherwise fails to follow the FRA regulations (see *id.* § 219.9(a)(5)) is subject to civil penalties (see *id.* Pt. 219, App. A), in addition to whatever damages may be awarded through the arbitration process.⁸ The regulations also require careful collection and handling procedures and highly proficient screening and confirmatory techniques, to protect against the possibility of testing errors (see Pet. Br. 10, 11-12 & n.17). What is more, employees are entitled to challenge a positive test result before a final investigative report is prepared (49 C.F.R. 219.211(a)(2)), and they are granted a hearing concerning a refusal to take the test (*id.* § 219.213).⁹

We do not suggest, of course, that no mistakes will ever be made in individual cases. But here, as in *Bell v. Wolfish*, 441 U.S. 520 (1979), the regulations have been challenged on their face, and thus "we deal * * * with the

⁸ The FRA explained (50 Fed. Reg. 31531 (1985)) that the penalty schedule in the regulations "recognizes that the best sanctions for certain prohibited conduct will be effected by private mechanisms. For instance, if an employee is suspended as a result of a breath or urine test that was poorly conducted, the most effective remedy will be the award of back pay and benefits to the employee by the board of arbitration."

⁹ Respondents suggest (Br. 27) that the content of this hearing—which is addressed only to whether an employee improperly refused to take a post-accident test—somehow denies employees the due process right to contest the testing procedures or the results of the test. That is not so. An employee retains any right he may have to contest any disciplinary action under procedures prescribed by the Railway Labor Act, 45 U.S.C. 151 *et seq.*

question whether [drug and alcohol testing] can *ever* be conducted on less than [particularized suspicion]" (*id.* at 560 (emphasis in original)). If, in a particular case, there is harassment (and respondents do not point to any in their brief), or there is laboratory error, an employee has a variety of private remedies available through the arbitration process. Individual errors, however, do not vitiate the essential reasonableness of the regulatory scheme as a whole.

3. Finally, respondents contend (Br. 35-43) that "the FRA regulations do not serve compelling governmental interests" (Br. 35). They speculate (Br. 36-37) that the testing will not promote greater deterrence, and they assert (Br. 37-38) that acquiring reliable data on the cause of accidents is not a sufficient justification for conducting the tests. Respondents also claim that the FRA regulations are not "reasonably relate[d]" (Br. 19) to the government's purposes, since blood and urine tests cannot measure present impairment. And respondents urge (Br. 38-43) that several "less drastic and equally effective means" (Br. 40) could be adopted "to address the legitimate governmental concerns" at stake.

a. Respondents offer nothing but conjecture to support their assertion that the FRA regulations will not deter drug and alcohol abuse by railroad employees. They contend that "[a]n employee who is not already deterred by the risk of an accident while impaired is not likely to be deterred by the risk of a post accident test" (Br. 36). After prolonged study and evaluation, the FRA determined otherwise, and its conclusion accords with common sense. An employee who is not sufficiently deterred by the prospect of *being* in an accident may well be deterred by the prospect of *being held responsible* for the accident and for a violation of the railroad's substance abuse rules. Drug

and alcohol testing increases deterrence by sharpening its focus, identifying the individual or individuals aboard the train whose impairment has caused the accident or incident. As we stated in our opening brief (at 38 n.40), moreover, there is every reason to believe that the FRA post-accident testing program has begun to achieve some of its intended deterrent effects.¹⁰

b. Respondents acknowledge that "the public interest justifies determining the cause of each railroad accident," but they contend that reliable data can be gathered even under a regime of particularized suspicion (Br. 37). As we explained at greater length in our opening brief (at 42-44), however, the FRA rejected that suggestion, and its reasons are persuasive. Many drug and alcohol abusers do not betray symptoms that are readily discernible to the naked eye. Supervisors and co-workers, moreover, have not proved willing or able to observe their colleagues and report substance abuse when they see it. And after an accident, symptoms of substance abuse that might otherwise have been discernible may be masked by injury, shock, or fatigue. In short, there will be a great many accidents and incidents in which no particularized signs of alcohol or drug impairment will be evident. The FRA should not be precluded, as respondents would have it, from determining the cause of those accidents.

c. Respondents contend that the FRA regulations are not "reasonably relate[d]" to the government's purposes because, in their view, "neither blood nor urine tests can measure current drug intoxication or degree of impair-

¹⁰ Apparently at least one locality has experienced similar results. See *Brief Amicus Curiae In Support Of Petition For A Writ Of Certiorari, Southern California Rapid Transit District*, at 15-16 (detailing the decreasing percentage of bus operators testing positive for illegal drugs since the inception of testing program).

ment" (Br. 19). We have shown in our opening brief (at 40-42) why that claim is unpersuasive. Respondents seem to believe that because a urine test, standing alone, cannot dispositively show current drug impairment, it therefore follows that an employer should not be permitted to require such a test. "But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence' " (*New Jersey v. T.L.O.*, 469 U.S. at 345 (quoting Fed. Rule Evid. 401)). Applying that principle, the FRA has explained that the results from a urine test must be considered in conjunction with other information before a judgment can be reached as to how an accident occurred. 49 Fed. Reg. 24291 (1984).¹¹ Some of that additional information will be provided by the mandated blood tests, which, the FRA found, "can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects" (*ibid.*).¹² Finally, and in any

¹¹ Respondents press on the Court (Br. 19) the palpably fallacious argument that because a positive urinalysis result is not a *sufficient* condition of impairment at the time of the accident, it therefore follows that the test is not reasonably related to railroad safety. But a positive result is at least a necessary, if not wholly sufficient, condition of such impairment. In our view, any test that reveals what is a necessary condition of dangerous behavior, and a sufficient condition of being *disposed* to such behavior, is a test that is reasonably related to railroad safety.

¹² In a glancing footnote, respondents assert that "[b]lood tests can determine recent [drug] usage, but not impairment" (Br. 20 n.11). The FRA concluded that blood testing can provide information pertinent to both recency of use and impairment, relying, in part, on findings prepared by the National Institute on Drug Abuse (see J.A. 63). Respondents do not explain why they dispute those findings. Indeed, the AFL-CIO, as amicus curiae in support of respondents, acknowl-

event, the FRA regulations are designed not only to discern impairment but also to deter it. Respondents cannot quarrel seriously with the FRA's determination that urine tests, whatever their technical limitations, provide a significant deterrent to the use of drugs by railroad employees who are about to go on duty.

d. Finally, respondents offer a list of "less drastic" alternatives to the FRA regulations, which, in their view, will prove "equally effective" in "address[ing] the legitimate governmental concerns" (Br. 40). But "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). This Court has cautioned against "indulg[ing] in 'unrealistic second-guessing,' " because " 'creative judge[s], engaged in *post hoc* evaluations of [government] conduct can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished.' " *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States v. Sharpe*, 470 U.S. 675, 686-687 (1985)). As the Court has explained, "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976). Accord *Colorado v. Bertine*, 479 U.S. 367, 373-375 (1987); *Cady v. Dombrowski*, 415 U.S. 433, 447 (1973).

In the present case, the FRA expressly considered the alternatives to drug and alcohol testing and found them

edges that "blood testing *alone* is sufficient * * * to determine whether the individual tested is under the influence of a drug at the time of the test" (Br. 17 (emphasis in original)).

wanting. See Pet. Br. 5-6 & n.6. While it agreed with respondents (see Br. 41) that the promulgation of Rule G by the railroads was a step in the right direction (48 Fed. Reg. 30723 (1983)), it concluded that enforcement efforts had proved inadequate (49 Fed. Reg. 24266 (1984)), and it found that the widespread perception of "unchecked management discretion to excuse or punish" had undermined the legitimacy of the rule itself (*id.* at 24267). Closer observation by railroad supervisors (see Br. 42-43) was no answer either, the FRA determined, because there was a "conspiracy of silence" among railroad employees concerning alcohol and drug use. 49 Fed. Reg. 24281 (1984). And while the FRA, like respondents (see Br. 41), believed that voluntary programs "offer[ed] hope for turning the problem around over the long term," it concluded that "[e]xclusive reliance" on such industry programs was "not warranted by available information and would be detrimental to the voluntary programs themselves" (50 Fed. Reg. 31527 (1985)).¹³

¹³ Respondents also suggest (Br. 41-42) that the FRA could accomplish its goals by adopting the less "invasive" (Br. 42) techniques employed by the Los Angeles Police Department in a pilot program for detecting drug-impaired drivers. To make the required identification, police officers are trained to conduct a four-step inquiry, including an interview concerning the suspect's medical and drug use history; an evaluation of the suspect's alertness and responsiveness; a measurement of certain physiological symptoms; and a battery of behavioral tests (J.A. 174). It is not clear that those procedures are truly less "invasive" than the FRA regulations. Nor is the Los Angeles program "equally effective" (Br. 40). Preliminary results show that the trained officers usually fail to detect certain types of drug use (such as amphetamines), and also fail to detect most drug use at low dosages (J.A. 177). What is more, the Los Angeles program, at its best, enables officers simply to identify drug users; it does not enable them, as the FRA procedures do, to discern how much of a particular drug is present. Respondents do not explain why they evidently prefer a less precise method of detection.

At bottom, respondents' insistence on "less drastic" alternatives would require this Court to second-guess the conclusions drawn by the FRA after years of investigation and study.¹⁴ Such a course is not only imprudent but is

¹⁴ Apart from their general reliance on "less drastic" alternatives, respondents catalogue several narrower objections to the details of the FRA program. For example, they quarrel with the fact that "management personnel are excluded" from the testing (Br. 3), despite the FRA's determination that "[t]he available accident statistics confirm that the biggest part of the alcohol and drug problem * * * is concentrated among the[] crafts that perform 'covered service.'" 49 Fed. Reg. 24286 (1984). And the category of "covered service" includes *all* employees, management or otherwise, that perform the services subject to the Hours of Service Act (45 U.S.C. 61-64b) (50 Fed. Reg. 31530 (1985)). Respondents also object to the fact that under Subpart C "the entire crew of a train is required to be tested" (Br. 4), despite the FRA's determination that "operating employees are most often at fault in alcohol and drug-related accidents"; that "some alcohol and drug-related accidents in the past have involved apparent sequential or simultaneous failures of performance by two or more crew members"; and that it is "extreme[ly] difficult[] [to] distinguish[] fault and degrees of fault immediately after the more substantial accidents * * *." 50 Fed. Reg. 31544 (1985). What is more, the suggestion (Br. 4) that under Subpart D the entire crew may be tested ignores the discriminating criteria that must be satisfied before any authorized testing may be conducted. Respondents also dispute the fact that "no tests are required at highway grade crossings" (Br. 4), despite the FRA's finding that "in the vast majority of cases railroad employees can only be viewed as additional victims of those tragedies, since they have no real opportunity to avoid them." 50 Fed. Reg. 31543 (1985). In a similar vein, respondents contest the need to test for alcohol and drug abuse, because of what they find to be a low statistical relationship between substance abuse and the total of all accidents and incidents (Br. 2). But respondents' comparisons are misleading, since they do not measure the relationship between substance abuse and the much narrower categories of serious accidents and incidents that actually give rise to mandatory or authorized testing under the regulations. The FRA decided to cover those categories precisely because

also inconsistent with the judgment of Congress, which, in enacting the Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III) 421 *et seq.*, expressly delegated broad authority to the Secretary to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety" (45 U.S.C. 431(a)). The Congress recognized that "a combination of factors ha[d] contributed to a steady decline in the rail safety picture" (H.R. Rep. 91-1194, 91st Cong. 2d Sess. 9 (1970)), and it therefore resolved to give the Secretary all of the "necessary administrative powers to carry out his duties[,] including, but not limited to, the authority to require the "testing of railroad facilities [and] * * * persons" (*id.* at 21). The FRA, by delegation from the Secretary, has carried out that congressional assignment in a careful and deliberate manner. There is no constitutional warrant for overturning its judgment.¹⁵

it found that alcohol and drugs were often a causal factor. See 50 Fed. Reg. 31542-31543 (1985). Moreover, respondents do not take into account the enormous costs of the covered accidents, in dollars and in lives, wholly apart from the statistical frequency with which they occur. Finally, respondents err in suggesting (Br. 5, 34) that the FRA regulations confer unbridled testing authority on private railroads. By their terms, the regulations purport only to confer the specific authority contained in Subpart D. If a railroad elects to test in a manner not prescribed by the FRA regulations, that is a matter for resolution under the Railway Labor Act, 45 U.S.C. 151 *et seq.* See *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, No. 88-1 (cert. granted, Oct 3, 1988).

¹⁵ We note, in this connection, the contention of the AFL-CIO, as amicus curiae, that the FRA lacked the authority to promulgate Subpart D of the regulations. That is so, the amicus contends, because Subpart D permits railroads to implement safety programs that "trump[] the [Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*] by precluding collective bargaining over matters which the RLA plainly commits to its bargaining process" (Br. 24). That claim was not raised by any of the parties below, was not considered by the court of appeals, was not set forth or fairly included in the petition for a writ of

certiorari, and has not been addressed by respondents in support of the court of appeals' decision. As such, it is not properly before this Court for review. See Sup. Ct. R. 21.1(a); *United States v. Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1979); *Mazer v. Stein*, 347 U.S. 201, 206 n. 5 (1954). In any event, the claim is entirely meritless. By its terms, Section 202(a) of the Federal Railroad Safety Act of 1970 states that the Secretary may not issue rules and regulations relating to qualifications of employees "except such qualifications as are specifically related to safety" (45 U.S.C. 431(a)). Thus, the plain language of the Act affords the Secretary the power to override RLA agreements to the extent that they impinge on safety requirements. That language, moreover, was not accidental. A precursor of the 1970 Act had specifically precluded the Secretary from interfering with RLA agreements, by (1) prohibiting the Secretary from issuing any regulations relating to employee qualifications, regardless of the nexus to safety and (2) providing expressly that "[n]othing in th[e] Act shall in any way be construed or applied so as to abridge, modify, limit, supersede, or repeal any provision of the Railway Labor Act * * * or any agreements made pursuant thereto" (see *Federal Railroad Safety Act of 1969: Hearings on S. 1933, S. 2915, and S. 3061 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 1, 2 (1969)). Both of those provisions restricting the Secretary's power to override RLA agreements were deleted in the final legislation, explicitly to "insure the fact that collective bargaining will not be used as a vehicle for undermining safety standards" (115 Cong. Rec. 40205 (1969) (Sen. Prouty)). As the accompanying Senate Report made clear, because of those deletions "[t]he protection for agreements, arrived at through collective bargaining, [do] not * * * extend to those agreements or elements thereof which were inconsistent with rules, regulations, or standards prescribed by the Secretary in accordance with the authority over railroad safety granted to him by this act." S. Rep. 91-619, 91st Cong., 1st Sess. 6 (1969). Finally, amicus' contention (Br. 28-29) that Subpart D is beyond the Secretary's authority because it authorizes, but does not mandate, certain testing procedures, cannot be squared with the broad language of Section 202(a), 45 U.S.C. 431(a), which empowers the Secretary to prescribe "appropriate" regulations "as necessary" to ensure railroad safety. There is no language requiring the Secretary to promulgate only those regulations that state mandatory standards. Moreover, where a railroad chooses to invoke the authority conferred by Subpart D, it is constrained by the mandatory procedures and safeguards set out in those provisions.

CONCLUSION

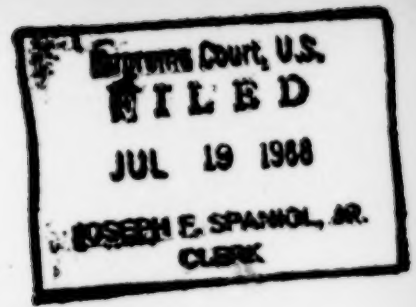
For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1988

9



No. 87-1555

IN THE
Supreme Court Of The United States

October Term, 1988

JAMES H. BURNLEY IV, SECRETARY
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

V.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE PRIVATE TRUCK COUNCIL OF
AMERICA, INC., THE NATIONAL-AMERICAN WHOLESALE GROCERS'
ASSOCIATION AND THE AMERICAN PETROLEUM INSTITUTE
IN SUPPORT OF REVERSAL

Peter A. Susser
1150 17th Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 956-5600

Counsel for *Amici Curiae*

OF COUNSEL:
William H. Borghesani, Jr.
Sheila A. Millar
Keller and Heckman
1150 17th Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 956-5600

G. William Frick
Alan B. Friedlander
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

July 19, 1988

TABLE OF CONTENTS

Table of Authorities	ii
Interest of <i>Amici Curiae</i>	2
Summary of Argument	4
Argument	5
I. A SHOWING OF "PARTICULARIZED SUSPICION" OF DRUG OR ALCOHOL IM- PAIRMENT IS NOT REQUIRED UNDER THE FOURTH AMENDMENT SINCE RAILROAD EMPLOYEES ARE SUBJECT TO STRICT REQUIREMENTS IN A PER- VASIVELY REGULATED INDUSTRY . . .	5
a. The Government Interest Is Substantial	6
b. Warrantless Inspections Are Necessary to Further the Regulatory Scheme	7
c. The Inspection Program Provides a Constitu- tionally Adequate Substitute for a War- rant	8
II. DRUG TESTING OF TRANSPORTATION WORKERS UNDER THE FRA REGULA- TIONS IS REASONABLE	9
a. The Searches are Justified at Their Inception	9
b. The Searches are Reasonably Related in Scope to the Circumstances Justifying the Intrusion	13
III. PUBLIC SAFETY INTERESTS IN CON- TROLLING DRUG USE AMONG RAIL- WAY PERSONNEL OUTWEIGH THE NEED TO PROTECT PRIVACY INTER- ESTS	15
Conclusion	18

TABLE OF AUTHORITIES

Cases:	Page
<i>Division 241 Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir.), <i>cert.denied</i> , 429 U.S. 1029 (1976)	10, 13
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1987), <i>petition for cert. filed</i> , 56 U.S.L.W. 3739 (U.S. April 15, 1988) (No. 87-1706)	11, 13
<i>McDonell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987)	8, 12, 13, 14
<i>National Treasury Employees Union v. Von Raab</i> , 816 F.2d 170 (5th Cir. 1987), <i>cert. granted</i> (No. 86-1879), 108 S.Ct. 1072 (1988)	12, 13, 14
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	9, 11
<i>New York v. Burger</i> , 107 S.Ct. 2636 (1987)	5, 6
<i>O'Connor v. Ortega</i> , 107 S.Ct. 1492 (1987)	5, 9
<i>Railway Labor Executives' Association v. Burnley</i> , 839 F.2d 575 (9th Cir. 1988), <i>cert. granted</i> (No. 87-1555) (June 6, 1988)	passim
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	17
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir.), <i>cert. denied</i> , 107 S.Ct. 577 (1986)	7, 12, 13
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	11
Constitution, Statutes, and Regulations:	
U.S. Const.: Amend. IV	5
Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III), 421 <i>et seq.</i>	15
Rail Safety Improvement Act of 1988, P.L. 100-342 (June 22, 1988)	8, 16

49 C.F.R. Pt. 219:

Section 219.1(a)	16
Section 219.203(e)	14
Section 219.205	14
Section 219.211(a) (2)	15
Section 219.301(c) (2)	10, 16

Miscellaneous:

48 Fed. Reg. 30723 (1983)	16
53 Fed. Reg. 22268 (1988)	4
S. 1041, 100th Cong., 1st Session (1987)	4
<i>Prosser and Keeton on the Law of Torts</i> (W.P. Keeton et al. 5th ed. 1984)	9-10

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1988

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

V.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE PRIVATE TRUCK COUNCIL OF
AMERICA, INC., THE NATIONAL-AMERICAN WHOLESALE GROCERS'
ASSOCIATION AND THE AMERICAN PETROLEUM INSTITUTE
IN SUPPORT OF REVERSAL

This brief is respectfully submitted on behalf of the Private Truck Council of America, Inc., the National-American Wholesale Grocers' Association, and the American Petroleum Institute, as *amici curiae*. Pursuant to Rule 36.2 of the Rules of this Court, *amici* have obtained and filed the written consents of each of the parties to the filing of this brief. The *amici* support the position of the Petitioners in this case and urge reversal of the decision below.

The sole question presented to the Court is whether regulations promulgated by the Federal Railroad Administration (FRA) -- mandating blood and urine tests of railroad employees who are

involved in certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents, and rule violations -- violate the Fourth Amendment on the ground that they do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to the testing.

INTEREST OF AMICI CURIAE

The Private Truck Council of America, Inc. ("PTCA") is an independent national organization representing the interests of non-transportation companies that operate proprietary truck fleets pursuant to and in furtherance of their non-transportation primary business endeavors. PTCA numbers approximately 1,800 members, comprising a cross-section of manufacturing, processing and retailing industries. Its membership includes a substantial number of Fortune 500 companies, as well as many smaller concerns. Trucks transport over three quarters of the Nation's freight and private carriage is clearly recognized as the largest single component of the trucking industry.

The National-American Wholesale Grocers' Association ("NAWGA") is a national trade association representing nearly 400 independent wholesale grocers and food service distributors. NAWGA member companies employ approximately 350,000 people nation-wide. These companies, both large and small, supply grocery products and provide a wide array of services to retail grocery stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from nearly 1,200 separate distribution centers, NAWGA member companies account for more than \$65 billion of the Nation's grocery product volume and 1/3 of the grocery supply distributed nationally. NAWGA's food service division, the International Foodservice Distributors' Association, represents member firms who sell annually over \$17 billion in food and related products to the institutional, away-from-home foodservice market. NAWGA's members have historically maintained interstate proprietary trucking fleets, and have more than 20,000 commercial motor vehicles on the highways during every business day.

The American Petroleum Institute ("API") is a national trade association representing over 200 companies involved in all sectors of the petroleum industry, including the refining, marketing and transportation of petroleum and petroleum products. The delivery of the most familiar of these, gasoline, accounts for more than 40,000-50,000 truck movements a day to every city and town in the United States or more than 15 million truck deliveries a year. Gasoline represents the most frequently transported hazardous material, accounting for almost one-half of all hazardous materials transported by highway. The sheer volume of gasoline delivered by tank truck, over 110 billion gallons per year, makes public exposure to and familiarity with gasoline higher than any other hazardous material. To supply the 160,000 retail gasoline facilities nationwide, cargo tank trucks pick up product from some 1,855 marketing terminals, which are supplied by barge or pipeline, and over 11,000 petroleum bulk plants located in all 50 states. The gasoline distribution network, for all intents and purposes, operates on a twenty-four hours a day, seven days a week schedule. Private companies (such as petroleum marketers and oil companies) and common carriers own some 130,000 tank trucks and trailers to transport hazardous materials such as flammable and combustible liquids. About 57,000 of these tank trucks are used to transport products such as gasoline, diesel and home heating oil. Railroad tank cars are also used extensively by petroleum industry firms, which transport both intermediate and finished products by rail.

In no area of American life is the threat posed by abuse of drugs and alcohol of greater concern than in commercial transportation activities involving the movement of freight or passengers. *Amici* are intimately familiar with these issues, since they represent member firms that possess substantial economic interests in the safety of transportation operations, both in their roles as motor carriers and as shippers and receivers of commercial goods. These corporations employ many thousands of workers in their truck fleets and related activities, and many transport materials which are classified as hazardous under a range of regulatory programs. The Court's resolution of the instant case is of particular concern

to the *amici* in light of pending rulemaking activities at the Department of Transportation,¹ and legislation currently under consideration in the Congress² that would establish drug testing requirements for motor carriers, including provisions which are comparable to the regulations challenged by Respondents.

SUMMARY OF ARGUMENT

The FRA's detailed regulations, which are intended to prevent accidents, injuries and casualties in railroad operations that result from impairment of employees by alcohol or drugs, 49 C.F.R. Part 219, do not violate the Fourth Amendment. For several reasons, a showing of individualized suspicion of drug or alcohol impairment is not required under the Fourth Amendment prior to conducting blood or urinalysis tests on transportation industry employees involved in major train accidents, fatal incidents or serious rule violations. First, the safety-related activities of railroad personnel are pervasively regulated, so the normal requirements of a warrant and probable cause for searches do not apply to drug tests of railroad employees involved in accidents or rule infractions. In addition, such searches are reasonable, in that testing under the FRA regulations is both justified at its inception and reasonably related in scope to the circumstances which justify the intrusion. Moreover, the FRA rules reflect the important governmental interest in promoting the sober operation of the Nation's railroads which outweighs individual Fourth Amendment interests raised by toxicological testing.

¹ On June 14, 1988, the Federal Highway Administration of the Department of Transportation published a Notice of Proposed Rulemaking concerning regulations which would mandate chemical testing of interstate or foreign commerce drivers for the use of drugs in several circumstances. 53 Fed. Reg. 22268 (1988).

² On April 15, 1987, the Senate Committee on Commerce, Science and Transportation reported S.1041, a bill which provided for testing for alcohol or controlled substances by the operators of aircraft, railroads and commercial motor vehicles. The bill was approved by the full Senate by a vote of 88-5 on October 30, 1987, and is now pending in a House-Senate conference.

ARGUMENT

I. A SHOWING OF "PARTICULARIZED SUSPICION" OF DRUG OR ALCOHOL IMPAIRMENT IS NOT REQUIRED UNDER THE FOURTH AMENDMENT SINCE RAILROAD EMPLOYEES ARE SUBJECT TO STRICT REQUIREMENTS IN A PERVASIVELY REGULATED INDUSTRY

For purposes of this brief, *amici* assume that screening for drug and alcohol use by urinalysis, breath and blood tests constitutes a search under the Fourth Amendment to the United States Constitution. The sole question before the Court is whether FRA regulations which require that employees be subjected to toxicological tests after any major train accident, any impact accident, or any fatal train incident, or when employees engage in certain rule infractions, violate the Fourth Amendment on the ground that they do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to the testing.

The Fourth Amendment provides that the right of the people to be secure against unreasonable searches and seizures shall not be violated. U.S. Const., Amend. IV. Except for certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless authorized by a valid search warrant. *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499 (1987).

Warrantless inspections are permitted under the Fourth Amendment where administrative searches of closely regulated industries are involved. *O'Connor v. Ortega*, *supra*. In *New York v. Burger*, 107 S.Ct. 2636, 2643-44 (1987), the Court outlined three criteria which must be met for a warrantless search of a closely regulated industry to be deemed reasonable. First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspection must be necessary to further the regulatory scheme. Third, the statutory inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. In his dissent in the case below, Judge Alarcon fully evaluated the FRA regulations, apply-

ing the *Burger* criteria, and correctly concluded that the toxicological testing program established under the regulations satisfies the three-prong test. The *amici* urge the Court to apply the administrative search exception to drug testing without particularized suspicion in transportation activities which are subject to extensive government regulation.

a. The Government Interest Is Substantial

The government's substantial interest in assuring railroad safety by discouraging drug or alcohol use on the job is not really in question. The court below erred in concluding that the administrative inspection exception does not apply to the FRA regulatory scheme because "the vast bulk of [railroad] safety legislation is directed at owners and managers of railroads, not their employees." *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d 575, 585 (9th Cir 1988), *cert granted*, No 87-1555 (June 6, 1988). This conclusion is at odds with long-recognized principles of common carriers' liability for acts of their employees. It is axiomatic that owners and managers of railroads do not involve themselves in the day-to-day operation of the railroad system, yet retain ultimate responsibility for the safety of the railroads. Railroad safety is pervasively regulated, and employers, under general principles of agency law, are typically liable for the acts of their employees. Thus, train accidents, releases of hazardous materials, and similar events caused exclusively by the carelessness of railroad employees, are generally imputed to the employer for purposes of liability. Thus, even assuming that most railroad safety regulations are directed at owners and managers, not employees, this should in no way alter the determination that railroad safety is pervasively regulated for purposes of assessing the constitutionality of employee drug and alcohol testing requirements.

However, there is a long history of federal regulation of the conduct of railroad personnel for the purpose of enhancing safety on the rails. Maximum working hours and safe work practices have been mandated by the federal government for railroad employees for many years. As Judge Alarcon noted, "An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of

alcohol or drugs." *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d at 593 (Alarcon, J., dissenting). Accordingly, railroad crews have long been subject to government regulations which mandate certain acts and prohibit other practices.

In *Shoemaker v Handel*, 795 F.2d 1136 (3d Cir), *cert denied*, 107 S.Ct. 577 (1986), the appellate court decision which most carefully considered warrantless drug testing in a pervasively regulated industry, the Third Circuit held that the administrative search exception extended to warrantless drug and alcohol testing of employees in the heavily regulated horseracing industry. The Third Circuit reasoned in *Shoemaker* that "public confidence forms the foundation for the success of an industry based on wagering." 795 F.2d at 1142. The court below conceded that "the railroad industry has experienced a long history of close regulation," including regulation as to railroad safety. *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d at 585. *Amici* believe that the public interest in assuring that the safety of the nation's railroad system is maintained is far more compelling than the public interest in assuring the integrity of the horse racing industry. The majority in the case below attempts to distinguish *Shoemaker* on the grounds that "jockeys, as the persons engaged in the regulated activity, are the principal regulatory concern." This misconstrues the central regulatory concern in *Shoemaker*, which was to protect the integrity of the horse racing industry by assuring scrupulous honesty in racing. Since jockeys ultimately control the animal on the racing field, they are a logical and legitimate focus of a search designed to discourage drug and alcohol abuse. Similarly, the regulations at issue focus, just as they do in *Shoemaker*, on those employees who are central to -- and ultimately influence and control -- the principal regulatory concern, *i.e.*, railroad safety.

b. Warrantless Inspections Are Necessary to Further the Regulatory Scheme

The warrantless inspections authorized by the FRA regulations are necessary to further the regulatory scheme. The testing requirement is applied only after major accidents or fatal incidents, or in the wake of serious rule violations involving significant risks of injury or property damage. Under the circumstances, the

inspections are necessary to carry out the purposes of the regulations. These include the deterrence of drug and alcohol abuse on-the-job by railroad employees, since detection is likely. They are also necessary to ascertain the cause of accidents and serious rule violations, a compelling interest of the railroads, the government and the public.

c. The Inspection Program Provides a Constitutionally Adequate Substitute for a Warrant

The testing program is spelled out in detail in the FRA regulations, offering an acceptable substitute for a warrant in terms of providing certainty and regularity of the search application. Railroad employees have ample notice as to the timing of the searches, and are aware that all employees involved in major accidents, fatal incidents, or significant rule violations must be tested. There is no possibility that arbitrary testing can occur. As the circuit courts in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir 1987), and *Shoemaker* concluded, urinalysis and blood tests are constitutionally acceptable as far as the criteria of certainty and regularity are concerned when conducted uniformly, or by lot. The same conclusion should be applied to post-accident testing and screening conducted after violations of rail safety rules.

Finally, the premise for the Court of Appeal's holding that the administrative exception is inapplicable to the FRA testing program -- i.e., its conclusion that the actions of railroad workers are not the subject of extensive government safety regulation -- has been invalidated by recent federal legislation. The Rail Safety Improvement Act of 1988, P.L. 100-342, a statute which is largely focused on safety-related activities of railroad workers, became law on June 22, 1988. That measure makes it illegal for train crews to tamper with safety devices, mandates a federal licensing system for rail engineers and establishes federal civil penalties against individual workers for safety violations. To the extent that the issue was previously uncertain (a point which the *amici* do not concede), it is now abundantly clear that individual railroad workers are subject to close regulation at the federal level which is focused on the same concerns which gave rise to the FRA testing programs: railroad safety and public safety. Accordingly, the Court

should hold that the challenged drug tests conducted under the FRA regulations fall within the category of warrantless searches of pervasively regulated industries that are constitutional.

II. DRUG TESTING OF TRANSPORTATION WORKERS UNDER THE FRA REGULATIONS IS REASONABLE

Under the Fourth Amendment, the reasonableness of a search is determined by whether the action was justified at its inception, and whether the search, as actually conducted, was reasonably related in scope to the circumstances which justified the interference in the first place. *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). See also *O'Connor v. Ortega*, 107 S.Ct. at 1502-03. The *amici* believe that testing for drug and alcohol use of employees involved in major accidents, fatal incidents or rule violations (as defined in the FRA regulations) is both justified at its inception and reasonably related in scope to the circumstances justifying the interference.

a. The Searches Are Justified At Their Inception

The government has a compelling interest in assuring transportation safety. This is recognized both by the numerous FRA and Department of Transportation (DOT) safety regulations and by common law. For example, railroads are common carriers, and, as such, have been held to a high standard of care from the perspective of tort liability. It has been stated that:

Common carriers, who enter into an undertaking toward the public for the benefit of all those who wish to make use of their services, must use great caution to protect passengers entrusted to their care; and this has been described as "the utmost caution characteristic of very careful prudent men," or "the highest degree of vigilance, care and precaution." Where the carrier receives goods for transportation, his responsibility is even higher, and the common law made him an insurer of their safety against all hazards except an Act of God and the public enemy.

Prosser and Keaton on Torts, 5th Edition, (W.P. Keaton et al., 5th ed. 1984), 208-209. Common carriers are generally liable for the negligent acts of their agents/employees in operating the transportation service, and must assure that employees operate transportation equipment in a safe and prudent manner.

Considering the high standard to which common carriers such as railroads are held, it is reasonable to require railroad employees involved in accidents, incidents, or certain rule infractions which present actual or potential safety hazards to themselves, to the public, to the property of railroads and their customers, and to the environment, to submit to drug and alcohol tests. As noted by the Seventh Circuit, "the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Division 241 Amalgamated Transit Union (AFL-CIO) v Suscy*, 538 F.2d 1264, 1267 (7th Cir), *cert denied*, 429 U.S. 1029 (1976). If particularized suspicion is required before a railroad can lawfully test crew members for drug or alcohol use, the rail carrier's ability to determine the cause of accidents and near accidents is likely to be constricted severely.

The Court of Appeals erred in stating that a requirement of individualized suspicion "poses no insuperable burden on the government," *Railway Labor Executives' Association v Burnley*, 839 F.2d at 588, and betrays a lack of familiarity with the nature of transportation operations. In most modes of commercial transportation, including the railroads regulated by the instant testing provisions, workers are in transit and away from the scrutiny of supervisors for the vast majority of their working time. To require particularized suspicion in every instance for employees (such as through the specific personal observations of supervisors for "reasonable suspicion" testing under 49 C.F.R. § 219.301(c)(2) or comparable standards) will effectively eliminate testing in many circumstances. That result will have a negative impact on substantial governmental interests in transportation safety, *i.e.*, accident investigation and deterrence of drug use.

In striking down tests under the FRA regulations which are conducted in the absence of "particularized suspicion", the Ninth

Circuit observed that accidents, incidents or rules violations do not, by themselves, establish reasonable grounds to believe that a train crew, or even a single employee, will demonstrate impairment due to drugs or alcohol. Yet, the strict standard which the Court of Appeals would impose ignores this Court's recognition that particularized suspicion is not an irreducible minimum of a reasonable search. *New Jersey v TLO*, 469 U.S. at 342 n.8. Indeed, in certain limited circumstances, the balance of interests precludes insistence upon "some quantum of individualized suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). This view has been correctly applied by the majority of appellate courts which have reviewed testing programs which did not require individualized suspicion prior to mandated testing.

While questioning the ability of certain tests to measure impairment and supply the required nexus to safety interests, the District of Columbia Circuit held that a school board could constitutionally administer drug tests during the course of a routine physical exam given to school transportation employees who have responsibilities for assisting children and assuring their physical safety. *Jones v McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *petition for cert filed*, 56 U.S.L.W. 3739 (U.S. April 15, 1988) (No. 87-1706). As noted in the court's decision:

There can be no doubt whatsoever that the School System's mission of safely transporting handicapped children to and from school cannot be ensured if employees in the Transportation Branch are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous. The case law on this point is clear that a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or of others.

833 F.2d at 340. Accordingly, the D.C. Circuit found that the employer acted pursuant to a significant and compelling governmental interest in mandating the drug tests which were at issue in *McKenzie*.

Taking note of the fact that "the use of illicit drugs has had a pernicious impact on American society" by compromising the public's health, safety and security, the Fifth Circuit held that the Customs Service's program requiring employees seeking transfer to certain sensitive jobs to submit to urine testing was reasonable and constitutional. *National Treasury Employees Union v Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert granted*, No. 86-1879, 108 S.Ct. 1072 (1988). Finding that the government has a strong interest in filling key drug enforcement positions with individuals who are not drug users, the *Von Raab* court upheld the challenged testing program based on the scope of the privacy intrusion, the justification for the search and the manner in which the tests were administered.

In *McDonell v Hunter*, *supra*, the Eighth Circuit held that employees of the Iowa Department of Corrections who have regular prisoner contact could be subjected lawfully to urinalysis testing, either uniformly or by systematic random selection. Finding that drug use would affect the ability of corrections employees to safely perform their work and pose a real threat to the security of the prison, the appeals court held that the administration of limited testing was the only way in which this legitimate concern could be controlled in a satisfactory manner. 809 F.2d at 1308.

In *Shoemaker v Handel*, 795 F.2d 1136 (3d Cir.), *cert denied*, 107 S.Ct. 577 (1986), the Third Circuit reviewed regulations adopted by the New Jersey Racing Commission which permitted officials to require jockeys to submit to breathalyzer and urine tests to detect alcohol or drug consumption. Finding that the state has a strong interest in assuring the public of the integrity of persons engaged in the horse racing industry, the court in *Shoemaker* stated that frequent drug and alcohol testing is an effective means of demonstrating that such individuals are not subject to certain outside influences. 795 F.2d at 1142. Applying the warrantless administrative search exception (discussed previously in further detail), the Third Circuit held that the daily selection by lot of jockeys to be subjected to drug testing does not violate the Fourth Amendment.

In the case involving the closest factual setting to that of the instant proceeding, *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, *supra*, the Seventh Circuit upheld a drug and alcohol testing program for drivers employed by the Chicago Transit Authority who were involved in serious accidents. Even where the employer possessed no specific knowledge about the condition of an employee subject to such testing (apart from his involvement in a serious accident), the court found that the transit agency had a "paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs." 538 F.2d at 1267.

Particularized suspicion was not a necessary prerequisite to finding such tests constitutional in any of these cases, in which reviewing courts weighed the government interest in conducting such searches against the intrusion. The *amici* submit that these appellate courts applied an appropriate standard to drug and alcohol testing programs in diverse settings. The *amici* further note that the public interest in railroad safety is at least as compelling as those interests found to justify drug tests without individualized suspicion in *McKenzie*, *Von Raab*, *McDonell*, *Shoemaker* and *Suscy*. Accordingly, the *amici* submit that the Ninth Circuit erred in concluding that the searches authorized under the FRA regulations are not justified at their inception.

b. The Searches Are Reasonably Related In Scope To The Circumstances Justifying The Intrusion

The court below did not specifically decide the issue of whether the searches authorized by the FRA regulations are reasonably related in scope to the circumstances which justify the interference in the first place, absent particularized suspicion. Instead, the Court of Appeals determined that the regulations would be reasonable in scope if amended to incorporate a particularized suspicion requirement. *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d at 588. The *amici* believe that the test regulations as presently constituted are reasonable in scope for a number of reasons.

The FRA regulations permit toxicological tests to be conducted in the absence of particularized suspicion of impairment only in narrowly defined circumstances. The first is in the wake of "major accidents," defined as those involving a fatality, a release of a hazardous material accompanied by an evacuation, a reportable injury resulting from the release, or substantial damage to railroad property. The second is after an "impact accident" resulting in either a reportable injury or property damage in excess of \$50,000. The third involves a fatal train incident, defined as one involving a fatality to any on-duty railroad employee. In addition, the fourth circumstance in which employee toxicological testing may be mandated under the rule is when an employee has been involved in certain rule infractions which present substantial safety hazards to persons and property. Thus, only where substantial actual injury to persons or property has occurred, or when potentially serious and life-threatening rule violations have taken place, are these searches authorized. Accordingly, the circumstances under which these searches may be conducted and the scope of the searches are well-defined in the regulations.

There is no leeway for arbitrary application of the testing requirements by supervisory or medical personnel. See *National Treasury Employees Union v Von Raab*, *supra*. Under the FRA rules, tests are given uniformly to all employees directly involved in an accident or incident, including, where appropriate, dispatchers and signal maintainers as well as members of the operating crew. See *M:Donell v Hunter*, *supra* (upholding uniform or systematic random testing of prison personnel having regular contact with prisoners). The FRA regulations mandate that the searches be conducted at medical facilities, and the regulations specifically provide that physicians retain the discretion to determine whether or not drawing a blood sample is consistent with the health of an injured employee or an employee otherwise afflicted by any other condition which may preclude such an act. 49 C.F.R. § 219.203(e). The regulations incorporate special provisions to assure that samples are kept intact and shipped promptly, see 49 C.F.R. § 219.205, and employees have an opportunity to respond in writing to the results of the toxicological tests prior to the

preparation of any final investigation report concerning the accident or incident, see 49 C.F.R. § 219.211(a)(2). These safeguards are designed to limit the scope of the searches to assure their reasonableness.

Given the public health and safety concerns involved in these accidents, incidents and rule violations, the documented link between such events and substance abuse, and the government's interest in investigating the cause of these serious occurrences, the testing program must be deemed to reasonably relate to the circumstances justifying the testing, *i.e.*, assuring increased railroad safety by deterring on-the-job use of drugs and alcohol.

III. PUBLIC SAFETY INTERESTS IN CONTROLLING DRUG USE AMONG RAILWAY PERSONNEL OUTWEIGH THE NEED TO PROTECT PRIVACY INTERESTS

The court below properly concluded that adherence to a warrant requirement as a prerequisite for conducting these tests was not necessary. *Railway Labor Executives' Ass'n v Burnley*, 839 F.2d at 582. The court erred, however, in concluding that such searches were unreasonable, solely because a showing of "particularized suspicion" is not required in every case prior to testing. Normally, the standard of reasonableness applicable to a particular class of searches requires balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. *O'Connor v Ortega*, 107 S.Ct. at 1499. In the case of the FRA regulations, this determination of reasonableness requires weighing the railroad employees' reasonable expectations of privacy against the government interest in the safe and efficient operation of the railroads for the benefit of railroad employees, passengers, customers and the general public.

The governmental interest in this case is clear. In the Federal Railroad Safety Act of 1979, 45 U.S.C. (& Supp. III) § 421, *et seq.*, Congress directed and authorized the Secretary of Transportation to adopt those rules, regulations, orders and standards which are

necessary for railroad safety.³ In a rulemaking which found that alcohol and drug use is sufficiently common to pose a significant safety problem, FRA determined that impairment of railroad workers due to such substances constituted causal or contributing factors in a number of train accidents and employee fatalities. 48 Fed. Reg. 30723, 30726 (1983). To combat this documented role of worker impairment due to alcohol and drugs, the FRA promulgated extensive toxicological testing requirements. Designed to "prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs", 49 C.F.R. § 219.1(a), the FRA regulations mandate testing in some circumstances (Subpart C) and authorize testing in other cases (Subpart D).

The agency's action in mandating tests in some circumstances in which individualized suspicion is not present was made necessary by the fact that symptoms of drug use are often undetectable by even a reasonably trained supervisor. Some "functional" drug users are able to avoid job-related problems for lengthy periods until their habits or practices reach a crisis stage. Accordingly, drug tests of transportation workers allow for more complete and accurate analysis of the cause of accidents and casualties, and they serve as a deterrent to drug use.

Balanced against this compelling public safety interest is a limited intrusion on the individual worker for the purpose of obtaining and analyzing certain body fluid samples. The FRA regulations establish a system through which employees can expect testing on the occurrence of specified events (e.g., accidents or rules violations). In other circumstances, protections limit unreasonable or arbitrary designation for testing, such as limitations on "reasonable suspicion" tests to circumstances in which supervisors have personally observed questionable behavior, 49 C.F.R. § 219.301(c)(2). Various provisions of the rule limit the time frame

³ As noted previously, this governmental interest has been reinforced by the enactment of the Rail Safety Improvement Act of 1988, P.L. 100-342 (June 22, 1988).

in which tests are to be administered, the facilities and individuals who will conduct tests, as well as the scope of testing.

This limited intrusion takes place within the context of the explicit notice (provided by the regulations) that a drug test might be required of the individual worker in narrow, specified circumstances. This prior warning has the effect of reducing the legitimate privacy expectations of employees engaged in covered railroad activities. Those who remain employed in operational capacities do so with the knowledge that a body fluid sample may be required. Workers who find this condition of employment sufficiently objectionable are free to terminate their employment relationship with the railroad or seek transfer to a position that is not covered by the testing rule.

"[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber v California*, 384 U.S. 757, 768 (1966). Here, the Congressionally mandated mission of FRA and the compelling public interest in safe transportation establish a clear justification for the tests which are at issue. *Amici* submit that the constitutional balancing test requires the conclusion that the Fourth Amendment is satisfied and that the Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, the searches authorized by the FRA regulations are not only reasonable under generally recognized principles as outlined above, but can also be upheld on the basis that they fall within the administrative search exception for pervasively regulated industries. Accordingly, the decision of the Court of Appeals should be reversed and the FRA toxicological testing regulations upheld.

Respectfully submitted,

Peter A. Susser
1150 17th Street, N.W.
Suite 1000
Washington, DC 20036
(202) 956-5687

Counsel for *Amici Curiae*
Private Truck Council
of America, Inc.
National-American Wholesale
Grocers' Association
American Petroleum
Institute

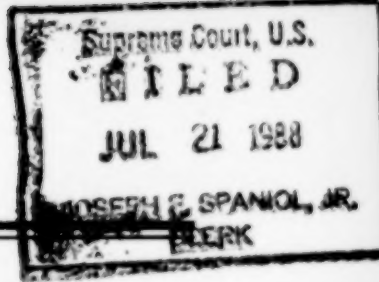
OF COUNSEL:

William H. Borghesani, Jr.
Sheila A. Millar
Keller and Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 956-5600

G. William Frick
Alan B. Friedlander
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Dated: July 19, 1988

No. 87-1555



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE
AMERICAN PUBLIC TRANSIT ASSOCIATION
IN SUPPORT OF THE PETITIONERS

Of Counsel:

ROBERT W. BATCHELDER
Chief Counsel and Executive
Director-Management
Services
AMERICAN PUBLIC TRANSIT
ASSOCIATION
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 898-4050

DONALD T. BLISS *
ROBERT E. SIMS
O'MELVENY & MYERS
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for
Amicus Curiae

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
A. Drug And Alcohol Abuse Pose A Significant Threat To Safety In The Public Mass Trans- portation Industry	6
B. Properly Conducted Post-Incident Drug And Alcohol Testing Does Not Violate The Fourth Amendment's Prohibition Against Unreason- able Searches And Seizures	8
1. Post-Incident Testing Serves The Compel- ling Public Interest In Protecting Public Safety	9
2. A Requirement Of Individualized Suspicion As Defined By The Ninth Circuit Is Im- practical And Constitutionally Unnecessary In The Post-Accident Environment	13
C. Employees Who Operate Trains Or Mass Tran- sit Vehicles Have A Reduced Expectation Of Privacy That Is Outweighed By The Public's Safety Interest	16
1. The Privacy Interests Implicated By Post- Incident Drug And Alcohol Testing Are Minimal	17
2. Safeguards Exist To Protect Employee Pri- vacy And Limit Discretion Of The Official In The Field	18
CONCLUSION	21

TABLE OF AUTHORITIES

CASES:

	Page
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	9
<i>Burka v. New York City Transit Authority</i> , 680 F. Supp. 590 (S.D.N.Y. 1988)	17
<i>Burnett v. Municipality of Anchorage</i> , 806 F.2d 1447 (9th Cir. 1986)	8
<i>Camara v. Municipal Court</i> , 387 U.S. 523 (1967)	9, 10, 13
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	16
<i>Division 241, Amalgamated Transit Union (AFL-CIO) v. Suscy</i> , 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976)	17
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981)	17, 20
<i>Everett v. Napper</i> , 833 F.2d 1507 (11th Cir. 1987)	8
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1987)	8, 17
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	3
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	9, 14, 16, 18, 20
<i>New York v. Burger</i> , 107 S. Ct. 2636 (1987)	20
<i>O'Connor v. Ortega</i> , 107 S. Ct. 1492 (1987)	4, 9, 17, 20
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)	17
<i>Railway Labor Executives' Ass'n v. Burnley</i> , 839 F.2d 575 (9th Cir. 1988)	9, 10, 15, 19, 20
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	8, 9, 18
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986)	17
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	3
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 (1975)	15, 16
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	9, 14
<i>United States v. Place</i> , 462 U.S. 696 (1983)	4

CONSTITUTIONS, REGULATIONS AND RULES:

U.S. Const. amend. IV	3
49 C.F.R.:	
Section 219.1 (a) (1987)	8
Section 219.201 (a) (1) (1987)	13

TABLE OF AUTHORITIES—Continued

	Page
Section 219.201 (a) (2) (1987)	13
Section 219.201 (a) (3) (1987)	13
Section 219.203 (a) (1987)	11
Section 219.205 (1987)	19
Section 219.211 (1987)	19
Section 219.211 (a) (2) (1987)	19
Section 219.303 (d) (2) (1987)	19
Section 219.305 (b) (1987)	19
Section 219.305 (d) (1987)	19
Section 219.307 (b) (1987)	19
<i>Control of Drug Use in Mass Transportation Operations</i> , 53 Fed. Reg. 25910 (1988)	3, 10

MISCELLANEOUS:

Connell, 11% Of RTD Bus Drivers Given Test Used Drugs, L.A. Times, Sept. 17, 1986, § 2, at 1	7
Johnston, L., O'Malley, P. & J. Bachman, <i>National Trends In Drug Use And Related Factors Among American High School Students And Young Adults, 1975-1986</i> , National Institute on Drug Abuse (1987)	7
Kolbert, 1 Of 3 Fail Drug Tests For Bus Jobs, N.Y. Times, Sept. 21, 1987, at B1, col. 6	7
Letter from Jim Burnett to Jack Gilstrap at 1 (Aug. 13, 1986)	8
Stuart, U.S. Cites Amtrak For Not Conducting Drug Tests, Washington Post, Jan. 8, 1987, at A20, col. 4	11
<i>Sixth Special Report to the U.S. Congress on Alcohol and Health</i> (Jan. 1987)	7
University of Michigan, News and Information Services (Jan. 12, 1988)	6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE
AMERICAN PUBLIC TRANSIT ASSOCIATION
IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

With the consent of the parties,¹ the American Public Transit Association ("APTA") submits this brief as *amicus curiae* in support of petitioners. It is of vital im-

¹ Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the parties' letters of consent have been filed concurrently with this brief.

portance to public safety that APTA's members—local public transit agencies—have the ability to conduct post-incident drug and alcohol testing of employees in safety-related positions. The Ninth Circuit's decision below jeopardizes their ability to do so and should be reversed.

APTA is the national association representing almost 400 local public transit agencies in the United States and is the nationwide repository of information about public transit systems. APTA's diversified membership includes large, publicly-owned transit systems with extensive bus and rail rapid transit operations serving large metropolitan areas and employing as many as sixty-eight thousand people, as well as small local companies serving rural areas and employing as few as five people. APTA's members also include thirteen commuter rail carriers that are subject to the Federal Railroad Administration's ("FRA") regulations presently before this Court.

The public transit industry has an exemplary safety record. But that record is greatly threatened by reports of the use of illegal drugs and alcohol by employees responsible for providing safe transportation. This threat has been of increasing concern to APTA, whose members provide over 30.5 million passenger trips each workday and over 9 billion passenger trips each year. The safety of these passengers, as well as the safety of transit industry employees, requires that drug and alcohol abuse be eliminated as a factor in transit-related accidents, injuries, and fatalities. Properly conducted drug and alcohol testing programs are an essential part of this safety responsibility. At the same time, however, APTA recognizes that for reasons of fundamental fairness and to satisfy constitutional requirements, such testing programs must provide adequate procedural protections for employees and minimize the intrusion into their privacy.

In September of 1987, APTA adopted a policy statement recommending that each of its member transit sys-

tems establish programs to address the problem of employee drug and alcohol abuse. (See Appendix at 1a-2a). In January 1988, after further study, APTA adopted a second policy statement recommending that Congress authorize the U.S. Department of Transportation ("DOT") to require, as a condition of federal grant assistance, that local public transit systems develop drug and alcohol testing programs. (See Appendix at 3a). DOT recently has proposed regulations, applicable to public transit systems, that would require, *inter alia*, procedures similar to the post-incident testing at issue in this case. See *Control of Drug Use in Mass Transportation Operations*, 53 Fed. Reg. 25910 (1988).

In accepting this case and *National Treasury Employees Union v. Von Raab*, No. 86-1879 (1987), this Court will address drug testing programs applicable to private interstate railroad employees performing essential safety functions in a federally regulated industry and to federal customs employees involved in sensitive enforcement responsibilities. As agencies owned or regulated by state and local governments, APTA's members have sought to achieve a constitutionally acceptable balance of the rights of their employees and the use of drug testing to preserve public safety under a variety of local conditions and circumstances. Indeed, many such members are directly subject to the Fourth Amendment's restrictions against unreasonable searches and seizures. U.S. Const. amend. IV. *Terry v. Ohio*, 392 U.S. 1 (1968); *Mapp v. Ohio*, 367 U.S. 643 (1961). The circumstances facing APTA's members thus present yet another context under which the ultimate question before this Court arises. This Court's guidance undoubtedly will have significant implications for the ability of public transit systems to utilize post-incident drug and alcohol testing to protect public safety under a variety of local conditions.

SUMMARY OF ARGUMENT

Employee drug and alcohol abuse presents a serious threat to passenger safety in many public transit systems. To combat this threat most such transit systems have adopted comprehensive drug and alcohol programs that include some employee testing under specifically defined circumstances. Such circumstances often include post-incident testing procedures similar to those provided for in the FRA's regulations. If allowed to stand, the decision of the Ninth Circuit below would cripple these drug testing programs and jeopardize the ability of transit agencies to ensure the safety of public transit riders, employees and the general public.

To determine whether post-incident testing violates the Fourth Amendment's proscription against unreasonable searches and seizures, the Ninth Circuit should have balanced "the nature and quality of the intrusion . . . against the importance of the governmental interests alleged to justify the intrusion." *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499 (1987) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). In rejecting such testing in the absence of individualized suspicion, however, the court below failed to consider fully the compelling public safety interests served by post-incident testing in contrast to the very limited nature of the intrusion.

Post-incident drug and alcohol testing is essential in providing safe transportation in at least two fundamental respects. First, such testing prevents accidents by deterring employee drug and alcohol abuse. Second, it helps transit agencies determine the causes of those accidents that do occur and thus to take steps to prevent them in the future.

The balancing issue thus presented by the Ninth Circuit's decision does not involve theoretical threats to safety. It only arises in circumstances where public safety in fact has been threatened. The public interest in deter-

mining why safety has been placed in jeopardy outweighs the narrow intrusion on employee privacy needed to help answer this question. Indeed, helping to answer such questions and taking reasonable steps to promote safety are essential parts of a transit employee's job. Furthermore, like railroad workers, transit employees in safety-sensitive positions have been entrusted with a special responsibility for the safety of riders, pedestrians, other drivers and their passengers and fellow employees under conditions where mental alertness and physical agility are absolute job prerequisites. For example, in an industry where operational error is the primary cause of accidents, bus drivers maneuver oversized vehicles in congested city streets avoiding darting pedestrians and dauntless drivers. They are expected to maintain order in a crowded bus and to respond quickly and skillfully in emergency situations. As common carrier operators, they are held to a higher standard of care and have a reduced expectation of privacy in the performance of their public responsibilities.

The court below also failed to consider the carefully limited nature of any intrusion into employee privacy. The expressly defined safety-related conditions that must precede post-incident testing clearly restrict supervisor discretion in ordering tests and limit the intrusion to circumstances directly related to the safety issue. Nor did the court consider the procedural protections that are designed to minimize risk of error and abuse of the testing procedure and to accord employees an opportunity to contest the findings and consequences of the test. Instead, the court focused solely on the intrusive nature of drug tests generally and virtually ignored the narrow and exceptional circumstances under which they are required to meet a vital safety interest when used only after accidents and other safety-related incidents.

The Ninth Circuit's requirement of individualized suspicion is completely impracticable in the real world of

public transit operations. Unlike alcohol abuse, impairment due to drugs is frequently very difficult for even trained observers to detect. This difficulty is accentuated under the chaotic circumstances in which an investigator would have to make such a determination (*i.e.*, shortly after a serious accident or incident). Under the distorted logic of the Ninth Circuit, in applying a balancing test to drug testing, a higher public interest value would be placed on protecting horse-race betting in New Jersey than on protecting the personal safety of common carrier passengers in California. The decision below, if allowed to stand, will adversely affect public safety by crippling the ability of transit agencies to deter drug and alcohol abuse by employees and to determine the causes of accidents.

ARGUMENT

A. Drug And Alcohol Abuse Pose A Significant Threat To Safety In The Public Mass Transportation Industry

The reasonableness of post-incident drug testing regulations depends in part on the scope of the safety problem faced by employers in the public mass transportation industry. Drug and alcohol abuse are national problems that have demanded the attention of the White House, Congress and state and local governments in recent years. Recent surveys suggest that a substantial percentage of the American public use illegal drugs or are problem drinkers.²

² Despite recent declines in the use of such drugs as cocaine, the United States still has "the highest rates of illicit drug use of any country in the industrialized world" according to a recent survey of high school seniors and young adults conducted by the University of Michigan. That survey shows that in 1987, 57% of high school seniors had tried an illicit drug, 36% had tried an illicit drug other than marijuana, 42% had used an illicit drug in the past year and 24% used a drug other than marijuana. University of Michigan, News and Information Service at 5 (Jan. 12, 1988). The National Institute on Drug Abuse recently reported that "[b]y their mid-

The high incidences of illegal drug and alcohol use in the United States are of concern to most employers. Public mass transit agencies have no reason to assume that their employees are less affected by these national problems than the general public, especially since transit services are concentrated in large urban areas where most transit employees reside and where drug use is most pervasive.³ Unlike many other employers, however, transit

twenties, nearly 80% of today's young adults have tried an illicit drug, including some 60% who have tried some illicit drug other than (usually in addition to) marijuana." L. Johnston, P. O'Malley & J. Bachman, *National Trends In Drug Use And Related Factors Among American High School Students And Young Adults, 1975-1986*, at 23 (1987) (emphasis in original). Moreover, "[b]y age 27, roughly 40% have tried cocaine." *Id.* (emphasis in original). As alarming as the rates of illicit drug use in this country are, they are equalled or surpassed by those for alcohol abuse. The U.S. Department of Health and Human Services recently reported that "[a]n estimated 18 million adults 18 years old and older currently experience problems as a result of alcohol use." *Sixth Special Report to the U.S. Congress on Alcohol and Health* at 12 (Jan. 1987). Alcohol accounts for approximately 97,500 deaths annually, including some 37,849 deaths due to alcohol-related accidents. *Id.* at 6.

³ For example, the New York Times has reported that "roughly one out of three applicants for entry level jobs with the New York Transit Authority failed the Authority's mandatory drug test." The failure rate is significantly higher than the rate for applicants for other City agencies that administer drug tests to prospective employees, *e.g.*, the failure rate for applicants to the New York City Police Department in 1986 was 2.2%. See Kolbert, *1 Of 3 Fail Drug Tests For Bus Jobs*, N.Y. Times, Sept. 21, 1987, at B1, col. 6. Similarly, the Los Angeles Times reported that 11% of the Southern California Rapid Transit District's bus drivers tested positive for drug use in the first year of its program. Connell, *11% Of RTD Bus Drivers Given Tests Used Drugs*, L.A. Times, Sept. 17, 1986, § 2, at 1. Approximately 10% of those drivers tested positive after being involved in an accident. *Id.*

In August of 1986, Jim Burnett, chairman of the National Transportation Safety Board ("NTSB"), wrote to APTA to express the NTSB's concern about drug and alcohol abuse in the public

agencies—like railroads—face serious consequences for public safety as well as financial liability for accidents occurring as a result of drug and alcohol abuse. This concern for safety is the stated purpose of the FRA regulations—“to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.” 49 C.F.R. § 219.1(a) (1987). This same concern for safety underlies the post-incident drug and alcohol testing programs employed by many local public transit agencies, which respond to local conditions and reported instances of drug use by transit employees in the community.

B. Properly Conducted Post-Incident Drug And Alcohol Testing Does Not Violate The Fourth Amendment's Prohibition Against Unreasonable Searches And Seizures

The question presented here is whether post-incident testing is a reasonable intrusion into the personal privacy of those railroad and transit employees covered by the FRA regulations or by local drug testing programs, or whether such testing constitutes an unreasonable search proscribed by the Fourth Amendment.⁴

transit industry. In that letter, Mr. Burnett reported on the NTSB's investigation of five rail rapid transit accidents in which licit or illicit drug use was an issue. Letter from Jim Burnett to Jack Gilstrap at 1 (Aug. 13, 1986). Fifteen persons were killed in these accidents, more than 350 persons were injured and more than \$5 million in property damage was reported. *Id.*

⁴ APTA recognizes that the drug and alcohol tests at issue in this case are “searches” within the meaning of the Fourth Amendment. This Court has held that blood tests are subject to constitutional scrutiny. *Schmerber v. California*, 384 U.S. 757, 767 (1966). And numerous lower courts have reached similar conclusions with respect to urine and breath tests. See, e.g., *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986). The parties and the Ninth Circuit also agreed that because of “the exigencies of testing for

To determine the standard of reasonableness applicable in this case, the public interest in protecting and promoting transportation safety must be balanced against the interests of those employees affected by testing. See, e.g., *O'Connor v. Ortega*, 107 S. Ct. at 1499-1503; *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967). As this Court stated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), “what is reasonable depends upon the context within which a search takes place.” *Id.* at 337. See also, *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.”)

The Ninth Circuit purported to strike this balance, finding that the FRA regulations could pass constitutional muster only if individualized suspicion served as a predicate for all testing conducted thereunder. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 589 (9th Cir. 1988). As shown below, however, the Ninth Circuit's analysis, as it affects local public transit, fails to comprehend the multifaceted public safety interests served by post-incident testing. Moreover, in the chaotic circumstances of a transit accident, the court's conclusion that the requirement of individualized suspicion “poses no insuperable burden on the government” is simply naive. *Burnley*, 839 F.2d at 588. In today's transit environment, the fact of the accident itself constitutes a reasonable basis for testing to serve a safety-related purpose.

1. Post-Incident Testing Serves The Compelling Public Interest In Protecting Public Safety

Neither the parties nor the Ninth Circuit has disputed the overall safety purpose of the FRA regulations

the presence of alcohol and drugs in blood,” no warrant is required for this type of body fluid testing. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 583 (9th Cir. 1988). See *Schmerber*, 384 U.S. at 770-71.

—to prevent accidents that result from drug and alcohol abuse. The public interest in protecting safety and health, as this Court has held, can justify searches in the absence of traditional probable cause or individualized suspicion. *Camara v. Municipal Court*, 387 U.S. at 535. As an essential component of a safety regulatory program, post-incident testing serves several purposes. The Ninth Circuit focused primarily on a single rationale for post-incident testing, *i.e.*, holding the employee accountable by determining whether he or she was impaired by drugs or alcohol at the time of a particular accident or incident. *Burnley*, 839 F.2d at 588. The FRA regulations and similar post-incident testing programs in public transit systems, however, serve other vitally important safety functions, which are detailed below.

Post-incident testing helps transit agencies to determine the causes of particular incidents.⁵ In the case of a bus accident, for example, the driver would be tested to determine whether drug or alcohol impairment may have played any role in the accident. The investigator properly will want to eliminate drug abuse as a causal or contributing factor as he or she seeks to reconstruct the

⁵ The Ninth Circuit was concerned that drug tests do not always demonstrate whether an employee was impaired at the time of an accident. *Burnley*, 839 F.2d at 588-89. But this does not diminish their value to an investigation of the causes of an accident. Test results are certainly highly probative evidence in such an inquiry. Illicit drugs can adversely affect motor skills and judgment, which are obviously vitally important to the operation or maintenance of a transit vehicle. *See, e.g.*, 53 Fed. Reg. at 25911-25913. And certainly an employee who tests positive for drug use after a serious incident is more likely to have been impaired at that time than an employee whose test is negative. The utility of post-incident testing, therefore, cannot be viewed in isolation. It is one part of an investigation, not the entire investigation itself. Where no other reasonable explanation for a particular accident surfaces, positive test results may prove to be conclusive. However, where other significant factors arise (*e.g.*, road or rail conditions, or equipment failure), such tests results may not be conclusive.

facts surrounding the accident. In the case of a serious rail incident the scene is often chaotic. When management or investigators arrive at the scene, the cause of the accident may not be readily evident. It is difficult if not impossible to determine which members of a train crew, if any, played a role in the events leading up to the accident. Often initial suppositions prove to be wrong.⁶ There is a narrow window in which an investigator can determine whether drug or alcohol impairment contributed in any way to the accident itself or its severity. It is, therefore, reasonable in such circumstances to test an entire train crew, as is required by the FRA regulations, *see* 49 C.F.R. § 219.203(a) (1987), and many local transit programs. If testing is delayed until all of the circumstances of an accident have been investigated and the role of specific employees identified, testing may be too late to help determine the cause of the accident. Evidence of drug or alcohol use could disappear during the intervening period or a positive finding could reflect alcohol or drug use after the accident.

A negative test result can be equally as important in determining the cause of a particular accident. Eliminating drug impairment as a potential cause of an accident helps establish the significance of other potential causes (*e.g.*, equipment failure, inadequate training or poor safety procedures) and suggests a more thorough examination of them. Frequently, as a result of such an examination, equipment modifications, changes in operational rules or training improvements are made. Accident in-

⁶ For example, it was initially unclear who or what had caused the tragic collision between an Amtrak passenger train and three Conrail locomotives that occurred near Baltimore, Maryland in 1987. Investigators could not determine whether human error or a mechanical failure was responsible for the accident when they first arrived at the accident scene. Stuart, *U.S. Cites Amtrak For Not Conducting Drug Tests*, Washington Post, Jan. 8, 1987, at A20, col. 4. Details of the accident continued to emerge in the days and weeks that followed.

vestigations are a primary source of information leading to accident prevention and improved safety.

Post-incident testing also allows transit agencies to determine whether a particular incident was made worse by employee impairment. A bus driver or members of a train crew not only have responsibilities for the safe operation of their respective vehicles, but they also must be able to respond appropriately in the event of an accident or other emergency. An employee who is unable to perform a vital task after an accident (*e.g.*, helping to evacuate passengers or extinguishing a fire) may be responsible for injuries or damages that were not directly caused by the accident itself.

Post-incident testing helps to identify those employees in need of treatment for drug and alcohol abuse, as well as identify those employees who should be removed from service because of their inability to respond to such treatment. Testing will also help employers assess the magnitude of any drug or alcohol problem in their respective work forces and respond with such additional programs and procedures as are necessary. It also will help to ensure continued public confidence in the transportation system.

Post-incident testing further serves to deter the use of illegal drugs and alcohol by covered employees. Any employee in a safety-sensitive position knows that he or she is likely to be tested upon the occurrence of any of the specified incidents. Since no individual can be certain that he or she will not be involved in such an incident, post-incident testing likely will reduce the risk that employees will be impaired by drugs and alcohol while on the job.

Finally, post-incident testing and its deterrent effect on drug and alcohol abuse will help lower the financial risks transit agencies and individual carriers must bear. Accidents caused by employee impairment are ultimately

paid for by transit agencies and consumers. Increased insurance premiums, property damages, and compensatory damages for those persons injured or killed in such accidents all justify employers' attempts to take reasonable steps to prevent them. The type of post-incident testing contemplated by the FRA regulations is such a reasonable step.

2. A Requirement Of Individualized Suspicion As Defined By The Ninth Circuit Is Impractical And Constitutionally Unnecessary In The Post-Accident Environment

Application of the standard of individualized suspicion suggested by the Ninth Circuit would jeopardize accident investigations. Instances in which drug impairment caused or contributed to an accident could go undetected.

Even for the trained observer, impairment due to drugs is difficult to detect without toxicological testing. Motor skills or judgment may be impaired by drugs without any of the outward signs commonly associated with alcohol (*e.g.*, smell or slurred speech). Moreover, individuals who appear to function normally while impaired by alcohol or drugs are not uncommon in the workplace. But their presence in an industry that carries millions of people each day is extremely dangerous.

Making the individual suspicion determination is especially difficult for an investigator during the disarray following a major accident or incident.⁷ The behavior

⁷ The incidents that trigger testing are extremely serious and the accident scenes are likely to be chaotic. The FRA regulations provide for mandatory testing for accidents involving fatalities, the release of hazardous materials that causes an injury or evacuation, or damage of \$500,000 or more, collisions with injury or damage of \$50,000 or more, or train incidents that fatally injure any on-duty railroad employee. 49 C.F.R. § 219.201(a)(1)-(3) (1987). Under such circumstances, it is unreasonable to impose on the investigator the additional burden of determining which if any employees appear to be impaired by drugs or alcohol.

of individuals at such a scene will likely be affected by the trauma of events and the investigator undoubtedly will have other pressing responsibilities that must be carried out expeditiously.

This Court has found that while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.'" *New Jersey v. T.L.O.*, 469 U.S. at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. at 560-61). The Ninth Circuit's requirement of individualized suspicion would perhaps be reasonable if the primary purpose of the FRA regulations and post-incident drug and alcohol testing generally was to identify and punish the individual employee testing positive. But the purpose of post-incident testing is to prevent accidents and protect public safety by deterring drug and alcohol abuse by transit workers and to determine the causes of those accidents that do occur, both of which are essential components of any safety program. These public safety interests are not well-served by the Ninth Circuit's requirement of individualized suspicion. See, e.g., *Camara v. Municipal Court*, 387 U.S. at 539 (contrasting administrative search involving health and safety with criminal investigation). Under the Ninth Circuit's standard, the causes of serious accidents would be left undetermined and the deterrent effect of testing would be diminished substantially. Rather than being certain that he or she would be tested upon the occurrence of certain enumerated events, an employee using drugs or alcohol could avoid testing, even after a serious accident, as long as he or she gave no outward appearance of being impaired to an investigator.

A determination based on individualized suspicion as the Ninth Circuit would require is not constitutionally required in the post-accident context. For in the extraordinary circumstances surrounding a major train or

transit accident in today's operating environment, there is substantial reason to doubt the Ninth Circuit's conclusion that serious train accidents or incidents do not themselves "create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." *Burnley*, 839 F.2d at 587.

This Court has stated that the reasonable or individualized suspicion standard is satisfied where the searching official is "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). A rail or bus accident is a "clearly articulable fact" from which impairment by drugs or alcohol is one reasonable inference. Bus drivers, rail operators and other transit workers with safety responsibilities are highly skilled employees who receive a great deal of training to perform their jobs. In an industry in which billions of passenger trips are made every year, serious accidents or incidents are quite rare. Unlike accidents involving passenger cars, serious bus or rail accidents are not routine occurrences. Those incidents that do occur frequently involve human error.

When a skilled professional is involved in a rare accident for which human error is frequently responsible, it is not unreasonable to suspect impairment. This is especially true in an industry such as public transit, where safety rules are numerous and vigorously enforced, with sanctions imposed on those who violate them. In such an industry, it is less likely that mere complacency, inattentiveness or recklessness, uninduced by any outside stimulant, would cause a serious accident or rule violation. As this Court found in *Brignoni-Ponce*, the characteristics or behavior of the individual suspect are not the only factors that can give rise to reasonable suspicion. In that case, this Court found that more gen-

eral factors such as "the characteristics of the area[,] . . . the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant" when the Border Patrol determines whether it has reasonable suspicion to stop a particular car. 422 U.S. at 884-85. Similarly, a serious transit incident is the kind of general factor from which one could reasonably suspect impairment. The fact that other potential causes of the incident (*e.g.*, highway or rail conditions, equipment failure or human error unrelated to drugs or alcohol) could also reasonably be inferred does not diminish the reasonableness of suspecting drug or alcohol use as a possible cause or contributing factor. Impairment, therefore, is a reasonable inference from a serious transit incident in today's operating environment. Thus, individual employees' involvement in the occurrence of specified incidents, such as those set forth in the FRA regulations, constitute a constitutionally reasonable basis for testing for safety-related purposes.

C. Employees Who Operate Trains Or Mass Transit Vehicles Have A Reduced Expectation Of Privacy That Is Outweighed By The Public's Safety Interest

When the compelling public interest in protecting transportation safety is balanced against the interest of common carrier employees subject to post-incident testing, such testing is clearly reasonable. As this Court stated in *New Jersey v. T.L.O.*, "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'" 469 U.S. at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979)). The post-incident testing provided for in the FRA regulations meets this standard.

1. The Privacy Interests Implicated By Post-Incident Drug And Alcohol Testing Are Minimal

The privacy interests implicated by post-incident testing are minimal because railroad employees or public transit workers in safety-related positions have a reduced expectation of privacy. The railroad industry is heavily regulated by the Federal government, and its employees, therefore, have a more limited expectation of privacy than employees in private industries. See *Donovan v. Dewey*, 452 U.S. 594, 600 (1981); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986). The same is true of employees of private mass transit companies, which are generally heavily regulated by state and local governments. Similarly, many public transit workers are actually employed by local governments and while such employees "do not lose Fourth Amendment rights merely because they work for the government instead of a private employer" the "operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable. . . ." *O'Connor v. Ortega*, 107 S. Ct. at 1498.

This Court has held that government agencies may place reasonable conditions on public employment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). It is certainly reasonable for local governments to "insur[e] that bus and train operators are fit to perform their jobs." *Division 241, Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976). Like the court in *Suscy*, other courts have found that a local government's interest in safety can outweigh the privacy interest of transit employees in safety-sensitive positions. See, *e.g.*, *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C. Cir. 1987) (upholding testing for school bus attendants responsible for supervising, attending and transporting handicapped children); *Burka v. New York City Transit Authority*, 680 F. Supp. 590, 607 (S.D.N.Y. 1988) (upholding against employees' motion for summary judgment).

ment testing program for mass transit workers because of local government's safety interest).

Transit workers and railroad employees are responsible for carrying millions of passengers on public highways and railways each year. And yet, under the Ninth Circuit's analysis, these individuals effectively have the same expectation of privacy on matters of drug or alcohol abuse as the average motorist. See *Schmerber v. California*, 384 U.S. at 768-70 (requiring individualized suspicion to justify blood test of motorist). The Ninth Circuit's position is simply untenable. Bus drivers, railroad workers and other transit workers are not everyday motorists. They are skilled professionals responsible for the lives of many innocent people. As such, they have a diminished expectation of privacy with respect to the state of their physical and mental condition as they perform their work.

2. Safeguards Exist To Protect Employee Privacy And Limit Discretion Of The Official In The Field

Post-incident testing by its very nature greatly limits the discretion of supervisors to order tests and restricts testing to legitimate safety purposes. Testing is triggered in most instances by specific occurrences—serious accidents or incidents—over which the supervisor or manager has no control. This necessarily greatly limits the discretion of the “official in the field,” *New Jersey v. T.L.O.*, 469 U.S. at 342 n.8, and avoids the risk that testing could be abused or used to harass individual employees. Moreover, the procedures for conducting the tests are reasonable and serve to limit their intrusiveness.

Under the FRA regulations, the testing policy is clearly set forth and all covered employees have received notice of those events that will trigger testing. As the Ninth Circuit pointed out, the tests themselves are reasonable in that they are performed in medical facilities and only personnel of the medical facility may supervise

the urine testing procedure. *Burnley*, 839 F.2d at 589. The regulations also provide for a chain of custody and handling of samples. 49 C.F.R. §§ 219.205, 219.211, 219.305(b) (1987); retesting after positive initial test results, 49 C.F.R. §§ 219.303(d)(2), 219.307(b) (1987); and employee notice and an opportunity to comment on results, 49 C.F.R. § 219.211(a)(2) (1987). Under Subpart D of the regulations an employee whose urine test is intended for use in any railroad disciplinary proceeding may request a more accurate blood test. 49 C.F.R. § 219.305(d) (1987). In addition, any employee testing positive would have the opportunity to challenge the test results and any proposed sanctions in a railroad disciplinary proceeding.⁸

The procedural protections provided in the FRA regulations limit the intrusiveness of testing and reasonably protect the employee's privacy interest from abuse by the discretion of railroad supervisors. Similar procedures can be found in the post-incident testing programs of many local transit agencies.⁹ As Judge Alarcorn stated

⁸ The court below was concerned that existing drug testing technology does not always allow a transit agency or a railroad company to determine whether an employee was impaired at the time of an accident. There is a risk, therefore, that post-incident testing may reveal evidence of off-duty drug use that did not cause or contribute to the particular accident at issue. This is not an unreasonable risk, however, for someone who chooses to work in a profession with such profound responsibilities for public safety.

Moreover, a transit industry employee, like a railroad employee, may contest in a disciplinary or other proceeding the accuracy of the test and the appropriateness of any sanctions under applicable local policies and procedures. Until improvements in technology allow agencies to determine what level of drug use actually impairs an employee, post-incident testing and the disciplinary process is a constitutionally reasonable method to protect both the public safety interest as well as the interest of the employee.

⁹ Though their exact parameters vary, the procedural safeguards provided by local public transit programs incorporate the basic elements of the FRA regulations and related state and federal laws.

in his dissent below, these procedural protections for employees "bring the time and place of the testing within reasonable bounds," *Burnley*, 839 F.2d at 597 (Alarcorn, J., dissenting), and provide an adequate substitute for a warrant. *Id.* at 594. Given the compelling interest local governments have in protecting public safety, similar procedural safeguards satisfy the requirements of the Fourth Amendment under both the administrative search standard applicable to closely-regulated industries, see *New York v. Burger*, 107 S. Ct. 2636, 2643 (1987); *Donovan v. Dewey*, 452 U.S. at 601-03 (1981); and the traditional reasonableness standard applicable to most warrantless searches, see *O'Connor v. Ortega*, 107 S. Ct. at 1501; *New Jersey v. T.L.O.*, 469 U.S. at 341.

They provide for advance notice to employees, test procedures that minimize the intrusiveness of the tests and ensure the integrity of their results, the opportunity to contest the results of a particular test or the imposition of sanctions and reasonable confidentiality of test results.

CONCLUSION

Post-incident drug and alcohol testing serves the government's compelling interest in protecting public safety by deterring drug and alcohol abuse by railroad workers and transit employees in safety-sensitive positions and by helping transit agencies determine the causes of those accidents that do occur. Because the public safety interest served by post-incident testing outweighs the privacy interest of common carrier employees subject to such testing, the FRA regulations at issue do not violate the Fourth Amendment's proscription against unreasonable searches and seizures. Therefore, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

Of Counsel:

ROBERT W. BATCHELDER
Chief Counsel and Executive
Director-Management
Services
AMERICAN PUBLIC TRANSIT
ASSOCIATION
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 898-4050

* Counsel of Record

July 21, 1988

DONALD T. BLISS *
ROBERT E. SIMS
O'MELVENY & MYERS
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
Attorneys for
Amicus Curiae

APPENDIX

AMERICAN PUBLIC TRANSIT ASSOCIATION
POLICY STATEMENT ON DRUG AND
ALCOHOL ABUSE

The transit industry recognizes the critical and growing problem drug and alcohol abuse poses in our society and in the workplace. The transit industry is committed to maintaining and improving our safety record by taking a strong stand against drug and alcohol abuse by transit employees. Therefore, the members of the American Public Transit Association call upon every public transit system to establish policies and implement the necessary programs to combat drug and alcohol abuse. The objective should be nothing short of a drug and alcohol free workplace.

Each transit system should evaluate and implement policies and programs based on a consideration of all factors including:

- (1) the transit industry's fundamental obligation to our passengers and the general public for providing safe, efficient, and economical transit service;
- (2) the appropriate balance between the rights of employees and necessary work rules to ensure a drug and alcohol free workplace;
- (3) special local circumstances including the scope and magnitude of drug and alcohol abuse in the community and within the transit system;
- (4) the developing legal and technical framework concerning drug and alcohol testing;
- (5) the expertise and views of local, state, and federal agencies such as the National Transportation Safety Board on such matters as pre-employment testing, post accident testing, the use of safety-

sensitive employees of prescription drugs, and employee assistance programs.

To assist in this effort, the American Public Transit Association will continue its program of sharing technical information with its members and providing leadership in the exchange of ideas and techniques to combat drug and alcohol abuse.

Adopted by APTA Executive Committee: 9/87

AMERICAN PUBLIC TRANSIT ASSOCIATION POLICY STATEMENT ON TESTING OF TRANSIT EMPLOYEES FOR DRUG AND ALCOHOL ABUSE

In view of the *Policy Statement on Drug and Alcohol Abuse* adopted by the Association calling for every public transit system to, ". . . Establish policies and implement the necessary programs to combat drug and alcohol abuse. . .", the members of the American Public Transit Association hereby adopt this policy supporting the establishment of the following provisions on testing of transit employees for drug and alcohol abuse:

1. That Congress provide the United States Department of Transportation the authority to require, as a condition of federal grant assistance, the development by local public transit systems of a program for drug and alcohol testing of transit workers.
2. That regulations implementing such authority be developed through a review and hearing process involving the transit industry.
3. Any such regulations be accompanied by necessary funding support.

The American Public Transit Association will assist in this effort, and will continue its program of sharing technical information on drug and alcohol testing with its members and providing leadership in helping its members to provide drug and alcohol free workplaces.

Adopted by APTA Executive Committee: 1/23/88

11
No. 87-1555

Supreme Court, U.S.

FILED

JUL 27 1988

JOSEPH E. SPANIO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

JAMES H. BURNLEY, et al.,

Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**AMICUS CURIAE BRIEF OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS**

RICHARD M. STEPHENS
Of Counsel
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ANTHONY T. CASO
*Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

*Attorneys for Amicus Curiae,
Pacific Legal Foundation*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED.....	iii
INTEREST OF AMICUS	1
OPINION BELOW.....	2
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE FOURTH AMENDMENT DOES NOT REQUIRE A WARRANT TO BE ISSUED PRIOR TO CONDUCTING ANY OF THE DRUG TESTS REQUIRED OR AUTHORIZED BY THESE REG- ULATIONS	4
A. Warrants Should Not Be Required Because the Drug Testing Program at Issue Is Similar to the Cases Involving Administrative Searches of Closely Regulated Industries ..	5
B. The Regulations Meet the Criteria for Appli- cation of the Administrative Search Excep- tion to the Warrant Requirement	9
1. The Governmental Interest Is Substantial	10
2. The Drug and Alcohol Testing Is Neces- sary to Further the Interest of Having Safe Operation of Railroads.....	11
3. The Testing Program's Certainty and Regularity Provide a Constitutionally Adequate Substitute for a Warrant.....	12

TABLE OF CONTENTS—Continued

	Page
II. THE REGULATIONS ARE REASONABLE.....	13
A. The Regulations Are Reasonable Because the Employees' Interests Are Relatively Min- imal	13
B. The Regulations Are Reasonable Because the Public Interest Is Substantial.....	15
CONCLUSION	18

TABLE OF AUTHORITIES CITED

	Page
CASES	
American Federation of Government Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986)	14
Brotherhood of Locomotive Engineers v. Bur- lington Northern Railroad Company, 838 F.2d 1087 (9th Cir. 1988).....	10
Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Company, 802 F.2d 1016 (8th Cir. 1986).....	11, 14
Donovan v. Dewey, 452 U.S. 594 (1981)	10
Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988)	14
National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987).....	17
New Jersey v. T.L.O., 469 U.S. 325 (1985).....	5
New York v. Burger, 482 U.S. ___, 96 L. Ed. 2d 601 (1987)	<i>passim</i>
O'Connor v. Ortega, 480 U.S. ___, 94 L. Ed. 2d 714 (1987)	5, 13, 16, 18
O'Halloran v. University of Washington, 679 F. Supp. 997 (W.D. Wash. 1988)	17
People v. Tinneny, 99 Misc. 2d 962, 417 N.Y.S.2d 840 (Sup. Ct. 1979)	6
Rushton v. Nebraska Public Power District, 653 F. Supp. 1510 (D. Neb. 1987), <i>aff'd</i> , 844 F.2d 562 (8th Cir. 1988).....	14
Schaill ex rel. Kross v. Tippecanoe County School Corporation, 679 F. Supp. 833 (N.D. Ind. 1988)	15

TABLE OF AUTHORITIES CITED—Continued

	Page
South Dakota v. Opperman, 428 U.S. 364 (1976)	10
Taylor v. O'Grady, 669 F. Supp. 1422 (N.D. Ill. 1987)	14
United States v. Biswell, 406 U.S. 311 (1972)	12
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	16

CONSTITUTION

Fourth Amendment	3, 4, 8, 12
Fifth Amendment	3

STATUTES

45 U.S.C. § 62(a)(1)	6
§ 431(e)	6
49 U.S.C. § 1801	7
49 C.F.R. § 218.1-218.30 (1986)	7
§ 218.37	7
§ 219, et seq.	3
§ 219.309(b)(2)	15
§ 220.61	7

RULES

Supreme Court Rule 36	1
-----------------------------	---

TABLE OF AUTHORITIES CITED—Continued

	Page
MISCELLANEOUS	
National Institute on Drug Abuse, Developing an Occupational Drug Abuse Program (1985)	17
Testing for Drug Use in the American Workplace: A Symposium, 11 Nova L. Rev. (1987)	14
United States Drug Enforcement Administration, Drugs of Abuse (1985)	16, 17

No. 87-1555

In The
Supreme Court of the United States
October Term, 1987

JAMES H. BURNLEY, et al.,
Petitioners,
v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

On Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respectfully submits this amicus curiae brief in support of petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting the

public interest. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an *amicus curiae* brief in this matter.

Pacific Legal Foundation, its members, and supporters have a great interest in the safe operation of the transportation industry. Therefore, the Foundation supports reasonable measures to detect and prevent needless accidents risking human lives and wasting the efforts of human resources caused by drug and alcohol abuse. The testing program provided by the federal regulations challenged in this litigation is not only reasonable, but is also a responsible method of ensuring safety. Pacific Legal Foundation's public policy perspective and litigation experience will provide this Court with additional arguments relevant to the proper resolution of this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 839 F.2d 575 (9th Cir. 1988).

STATEMENT OF THE CASE

The Federal Railroad Administration (FRA) adopted regulations which set forth a drug testing program for

railroad industry employees. Those regulations are codified in 49 C.F.R. § 219, *et seq.* (1986). Subpart C requires alcohol and drug testing by means of blood and urine analysis for all employees involved in certain train accidents. Those accidents include those involving either a fatality, release of hazardous material accompanied by an evacuation or injury, property damage of at least \$500,000 or \$50,000 if impact occurs, or a reportable injury (one affecting an employee's ability to work). Subpart D authorizes, but does not require, breath or urine tests when either a supervisor has a reasonable suspicion that an employee is under the influence of alcohol or drugs or an employee violates a railroad operating rule.

The respondents, Railway Labor Executives' Association (RLEA) and other railway labor organizations, filed suit in 1985 challenging these regulations as being violative of employees' Fourth Amendment rights to be free from unreasonable searches and seizures, Fifth Amendment rights to due process, equal protection, and privacy, and several statutory rights. The District Court granted summary judgment for the government on all grounds. The Ninth Circuit Court of Appeals reversed on the Fourth Amendment claim only and held that the regulations constitute an unreasonable interference with employees' reasonable expectations of privacy. The government filed a petition for certiorari which this Court granted on June 6, 1988.

SUMMARY OF ARGUMENT

As with administrative searches of closely regulated industries, a warrant is unnecessary for the drug and

alcohol tests required by the challenged regulations. The railroad industry is highly regulated in a manner which affects not only managers and owners, but also employees. Furthermore, a program of drug testing without a warrant is necessary to advance the governmental interest in safety. The regulations are rigid enough to protect employees from the whims of a supervisor's discretion.

Moreover, the testing program is reasonable. The employees' privacy interests are relatively slight. No non-incriminating evidence is obtainable through this program. The government interests, as government and as an employer, are great enough to justify a safety program similar to others used throughout the American work force. These regulations do not violate the Fourth Amendment.

ARGUMENT

I

THE FOURTH AMENDMENT DOES NOT REQUIRE A WARRANT TO BE ISSUED PRIOR TO CONDUCTING ANY OF THE DRUG TESTS REQUIRED OR AUTHORIZED BY THESE REGULATIONS

The Fourth Amendment proscribes *unreasonable* searches and seizures. One insurer of reasonableness is the issuance of a specific warrant based upon probable cause by a neutral magistrate. Although such warrants are typical, as the Court of Appeals recognized, they are "not the *sine qua non* of reasonableness." 839 F.2d at 582.

The Court has not required a warrant in cases where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). These categories of cases where warrants and probable cause are not required include searches of students' personal effects by school officials, *id.*, searches of workers' desks by employers, *O'Connor v. Ortega*, 480 U.S. ___, 94 L. Ed. 2d 714 (1987), and administrative searches of closely regulated industries, *New York v. Burger*, 482 U.S. ___, 96 L. Ed. 2d 601 (1987). A more exhaustive list can be found in the Court of Appeals decision. 839 F.2d at 583 n.11.

A. Warrants Should Not Be Required Because the Drug Testing Program at Issue Is Similar to the Cases Involving Administrative Searches of Closely Regulated Industries

In *New York v. Burger*, 96 L. Ed. 2d 601, this Court held that a search of an automobile junkyard need not be preceded by a warrant based on probable cause or justified by any exception to the warrant requirement other than the administrative search of closely regulated industries. This Court upheld the warrantless police inspection and discovery of stolen automobiles. The reason is one's privacy expectations are attenuated by engaging in an industry with a history of pervasive government oversight. *Id.* at 612. When determining whether the automobile junkyard business was a "closely regulated industry," the Court relied on the fact that the persons engaged in the business must keep and make available to officials "'detailed records of purchases and sales.'" *Id.*

at 617 (quoting *People v. Tinneny*, 99 Misc. 2d 962, 969, 417 N.Y.S.2d 840, 845 (Sup. Ct. 1979)). That was the extent of regulation which the Court held justified a warrantless and unannounced inspection of the premises.

The railroad industry, however, is subject to much more extensive federal regulation and has been for decades. A whole title of the federal codes is devoted to regulation of railroads and FRA is a government agency involved in the same activity. Regardless of these facts, the Court of Appeals held that the extensive regulation applied only to railroad owners and managers and therefore could not be used to justify searches of employees.

This holding is inappropriate for several reasons. First, not all of the penalties for violations of regulations the Court of Appeals cited fall on the company as opposed to its employees. 839 F.2d at 585 n.12. Persons who fail to make complete reports can be held criminally liable. 45 U.S.C. § 431(e), cited in 839 F.2d 585 n.12.

Second, and more importantly, it is naive to believe that the extensive regulations have no effect on railroad employees merely because most of the penalties can only be assessed against the company. Surely, employees who cause violations of federal regulations must give an account of their actions or inaction to their supervisors, if not to federal authorities directly. Federal regulations have long affected the everyday lives of railroad workers.

Third, as noted by the dissent in the Court of Appeals below, many regulations and statutes are specifically directed toward railroad employees. 839 F.2d at 593 (Alarcon, J., dissenting). These include 45 U.S.C. § 62(a)(1), regulating the number of working hours,

49 C.F.R. §§ 218.1-218.30, 218.37, and 220.61, requiring certain safety procedures to be performed by employees, and 49 U.S.C. § 1801, providing criminal penalties for employees who knowingly transport hazardous activities.

Fourth, the history of the administrative search does not recognize any distinction between employers and employees or between management and labor. It is highly unlikely that the result in *New York v. Burger* would be any different if, when inspecting the automobile junkyard, the police found an employee, rather than the owner of the junkyard, in possession of stolen automobiles. An administrative search diminishes the expectation of privacy of all who work in the industry since the inspection takes place where employees work.

There is a subtle suggestion in the Court of Appeals' decision that the administrative search exception is based on implied consent when a business applies for a license and, since railroad employees are not licensed, the search cannot apply to them. 839 F.2d at 585. Although consent may have been implied in other administrative search cases, *New York v. Burger* should have laid to rest the notion that consent by obtaining a license is the underlying rationale. In *Burger*, the operator of the junkyard did not have a license or consent to the search. 96 L. Ed. 2d at 609. Since he did not obtain a license and yet the administrative search exception applied, a license as a type of consent to search cannot be a prerequisite for administrative searches. That railroad employees may not be licensed by the government is irrelevant to the application of the administrative search exception.

There is no reason to restrict the application of the administrative search exception to employers, rather than to employees. Employees' privacy interests are also attenuated because they work in the physical area being searched. The Court of Appeals inappropriately refused to extend the nature of the search allowed by this exception from searches of property to searches of persons. 839 F.2d at 584. Urine, blood, and breath testing is clearly not as intrusive as a pat down search, a strip search, or probably the most intrusive, a body cavity search. However, since drug testing involves an analysis of bodily fluids, there is an assumption that the search is highly intrusive. Although appealing at first glance, the assumption is wrong.

First, urine and blood tests have long been a part of routine physical examinations, as opposed to searches of homes and premises which are supposedly less intrusive, although not nearly as common. Second, and more importantly, blood, urine, and breath tests are a uniquely narrow scoped search. The obvious concern of the Fourth Amendment's requirement of reasonable expectation of privacy is that searches normally reveal many private and noncriminal aspects of one's life. One cannot search a home and not see private, legitimate information irrelevant to the object of the search, such as one's personal records, correspondence, reading material, and a host of personal effects. However, that is not the case with drug testing. The tests in this case are as if law enforcement officers could enter one's home with a filter over their eyes to block vision to every private aspect of one's life, except the object of the search. Unlike any other search, drug testing allows a search for the items sought without

revealing any legitimate activity irrelevant to the search. "Extending" the administrative search exception to drug testing from premises searches is an extension to a less intrusive search.

There can be no doubt that the railroad industry is one of the most highly regulated industries in the country and has been so for a long time. The pervasiveness of these regulations touch the everyday work life of railroad employees. Drug and alcohol testing reveals less about the private lives of the ones being tested than does a search of the premises where they work or live. The lack of obtaining a warrant should be justified under the rationale of the administrative search exception.

B. The Regulations Meet the Criteria for Application of the Administrative Search Exception to the Warrant Requirement

Although the railroad industry is closely regulated, that fact alone does not give the government *carte blanche* to conduct any type of search it wants. A search pursuant to this exception must exhibit three criteria:

"First there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made.

. . . .

"Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.'

. . . .

" . . . '[T]he statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.'" *New York v. Burger*,

96 L. Ed. 2d at 614 (quoting *Donovan v. Dewey*, 452 U.S. 594, 601-03 (1981)).

Each of these criteria are met in the present case.

1. The Governmental Interest Is Substantial

No one can seriously doubt that the government has a substantial interest in knowing whether railroad employees are using drugs or alcohol. Safety is the obvious substantial interest. As Judge Alarcon poignantly stated: "An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." 839 F.2d at 593 (Alarcon, J., dissenting). "[L]ocomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands." *Id.* at 596.

Accidents involving drug using railroad personnel may not be common, but they are catastrophic and needless. *See, e.g., Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087 (9th Cir. 1988). There is nothing in the administrative search line of cases to suggest that any particular search be likely to produce evidence of wrongdoing. In fact, this Court in *South Dakota v. Opperman*, 428 U.S. 364, 378 (1976), recognized that searches may be justified by the severity of harm caused by failing to search, even though the likelihood of finding what is looked for during any particular search may be quite small. The deterrent effect of knowing a search can occur also should not be discounted.

Although evidence of drug and alcohol abuse acquired from these tests may be a small minority of those tested, the government interest is not insignificant

because those few who are impaired can cause catastrophic damage to life, limb, and property.

2. The Drug and Alcohol Testing Is Necessary to Further the Interest of Having Safe Operation of Railroads

There is no way to ensure that railroad personnel are not abusing drugs or alcohol other than by testing. Requiring reasonable, individualized suspicion of impairment is inappropriate for several reasons. Many employees may work without close supervision. The facts which give rise to "suspicion" are subject to quite varied interpretation. Testing based on such an amorphous standard could be subject to unfair overuse, underuse, and inconsistent application. Most importantly, drug impairment often does not carry any telltale signs as does alcohol impairment.

"The drunken employee may exhibit the odor of alcohol on his breath, may have slurred speech or a stumbling gait But the use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. The intoxicating effect of these substances is said to be primarily mental or emotional; a user's judgment or clear-headedness may be impaired without any obvious physical sign of intoxication. It is the insidious nature of these substances that too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene." *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Company*, 802 F.2d 1016, 1020 (8th Cir. 1986).

Testing is the only reliable method to determine drug impairment.

Deterrence of drug and alcohol abuse affecting employees' abilities is another obvious purpose of the regulations. That purpose makes the testing particularly appropriate for the administrative search exception, since deterrence is a common purpose for such searches. See *United States v. Biswell*, 406 U.S. 311, 316 (1972).

3. The Testing Program's Certainty and Regularity Provide a Constitutionally Adequate Substitute for a Warrant

The regulations provide both certainty and regularity in several respects. Employees involved in certain types of accidents will be tested in a very specific manner. There is nothing left to the whim of a supervisor. The tests must take place as soon as possible after the accident. Qualified independent medical personnel are used. Since the procedures surrounding the tests are standardized, there is no likelihood that an employee will be subject to search at a supervisor's whim. That is the concern of the Fourth Amendment.

The requirement that the search be "certain" and "regular" does not mean periodic. The Court in *New York v. Burger* did not find it necessary to know why the junkyard was inspected on that particular day. 96 L. Ed. 2d at 609 n.2. Regularity is satisfied when the search occurs under circumscribing conditions, such as those which are required in the regulations presently at issue.

The regulations at issue meet the requirements for administrative searches in closely regulated industries. The rails are one of the most highly regulated industries in the country and many of the regulations directly affect employees in the industry. The testing is pursuant to the substantial governmental interest in safety and is the

only effective means to promote that interest. The regulations are pervasive enough to control the discretion of supervisors. It is unnecessary and frustrating to the safety objective to require a warrant prior to conducting drug tests.

II

THE REGULATIONS ARE REASONABLE

The bottom line requirement for all governmental searches is reasonableness. This requirement exists regardless of whether or not a warrant is required. A plurality of this Court articulated the process by which reasonableness is determined in *O'Connor v. Ortega*. "In the case of searches by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Ortega*, 94 L. Ed. 2d at 724 (plurality opinion).

The balance in this case weighs in favor of the government's interest.

A. The Regulations Are Reasonable Because the Employees' Interests Are Relatively Minimal

On the employees' side of the balance, there are several privacy interests. One is to avoid the embarrassing process of providing a urine, blood, or breath sample in the first place. However, each type of these samples is a routine part of modern physical examinations. If a prospective employee cannot be required to provide a sample for this drug testing program, urinalysis unrelated to drugs as part of a physical examination, or even a physical examination itself, would be suspect as well.

The employees claim to have a privacy interest in the information obtained from the urine and blood itself. This is the primary argument that the tests reveal information about their private lives. Some have argued that urinalysis can reveal whether someone is pregnant, diabetic, or epileptic. However, the regulations do not authorize testing for pregnancy, diabetes, or epilepsy. It may be true that one *could* test for those characteristics, but this program does not do so.

Employees also have an interest in the accuracy of the tests, perhaps a due process interest. The Court of Appeals stated that drug testing literature is "replete with references to the unreliability of results." 839 F.2d at 589 (citing *Testing for Drug Use in the American Workplace: A Symposium*, 11 Nova L. Rev. (1987)). However, several courts have determined that combined use of the enzyme multiplied-immunoassay test (EMIT) and the gas chromatography/mass spectrometry (GC/MS) test is nearly 100% accurate. See, e.g., *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988); *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1430 (N.D. Ill. 1987); *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Company*, 802 F.2d at 1019; *American Federation of Government Employees v. Weinberger*, 651 F. Supp. 726, 729 (S.D. Ga. 1986).

The RLEA may also claim that employees have a privacy interest in not disclosing evidence of off duty drug use. The urine testing reveals drug use long after impairment. However, as Judge Alarcon noted in his dissent, employees are notified that, if they have used

drugs recently, they should have a blood test taken. " 'The blood test will provide information pertinent to current impairment.' " 839 F.2d at 597 (Alarcon, J., dissenting) (quoting 49 C.F.R. § 219.309(b) (2)) (emphasis by Judge Alarcon). The regulations provide an easy method whereby employees can protect whatever privacy interests there may be in off duty illegal drug use.

The employees' legitimate interests affected by these regulations are relatively small.

B. The Regulations Are Reasonable Because the Public Interest Is Substantial

There are two types of interests at stake here. One is the interest the government has in protecting the public interest. The other is the interest the government has as an employer. The public has a significant interest in ensuring that railway employees are drug free. The sheer power loosed in the movement of tons of cargo, and even toxic materials, is deserving of respect. Concern for lives of those in passenger trains should be paramount since the consequences of small mistakes can be catastrophic for even the most innocent of bystanders. The interest in preventing future accidents caused by drugs or alcohol is of the highest order.

The argument that one should be tested only if there is a reasonable suspicion from observation of drug impairment is practically unfeasible. One court recognized that drug use is undetectable by simple observation 95% of the time. *Schaill ex rel. Kross v. Tippecanoe County School Corporation*, 679 F. Supp. 833 (N.D. Ind. 1988).

A reasonable suspicion from mere observation also creates more problems that it purports to solve. One benefit of mandatory testing is that it does not involve some official's subjective discretion in deciding when and which employees should be tested. The Court recognized in *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976), that regularized checkpoints along highways which do not involve an official deciding at whim who and who not to stop are reasonable because of that fact. A reasonable suspicion requirement for urinalysis would only create a mechanism whereby the discretion of the one who decides who gets tested could result in unfairness. Testing of everyone involved in accidents as in this case is the most fair manner.

The plurality in *Ortega* recognized that government when acting as an employer is not as limited in its treatment of employees as in its treatment of the general public. "[T]he privacy interests of government employees in their place of work . . . while not insubstantial, are far less than those found at home or in some other contexts." *Ortega*, 94 L. Ed. 2d at 728 (plurality opinion).

All employers have some interests in having a drug free work force. One, some drugs have a long-term effect on people which decrease their productivity for all time, not just when "under the influence." United States Drug Enforcement Administration, *Drugs of Abuse* 37, 49 (1985). Hallucinogens can cause flashbacks which distort perception even after the drugs are eliminated from the body. See *Drugs of Abuse* at 49. Employers have an interest in not paying for employees who have a diminishing worth. Two, since many illegal drugs create a high susceptibility to addiction, employers have an interest in preventing

their employees from becoming worthless to the employer through addiction. *Id.* at 30-31. Three, employees who use illegal drugs on their own time are engaged in an illegal activity. Employers run the risk that an employee will be arrested and, therefore, be unavailable for work. Employees who use drugs are also more likely to abuse sick leave privileges. National Institute on Drug Abuse, *Developing an Occupational Drug Abuse Program* 10 (1985).

Although constitutional rights are not subject to the outcome of a commercial plebiscite, the increasing number of drug testing programs in the private sector is not insignificant. More than 25% of the Fortune 500 companies use some form of urinalysis drug testing for their employees. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 172 (5th Cir. 1987). The increased use of drug testing in the private sector suggests that urinalysis for employees is an employment practice which society in general is recognizing as reasonable. Reasonableness is always a relative concept. It would be anomalous to declare a practice unreasonable which many employers and employees have voluntarily agreed to use in the private sector. The prevalence of drug testing in society suggests that society considers the concept to be reasonable. This is especially true in this case because the drug testing program is not for the purpose of enforcing criminal laws against employees generally. See *O'Halloran v. University of Washington*, 679 F. Supp. 997 (W.D. Wash. 1988).

The governmental interest in railroad safety is paramount. Additionally, the governmental interest in the "efficient operation of the work place" is substantial.

Ortega, 94 L. Ed. 2d at 724 (plurality opinion). Together these interests render the drug testing program reasonable.

CONCLUSION

The railroad is one of the most pervasively regulated industries in the country. These regulations even touch the everyday work of railroad employees. The drug and alcohol testing program should be free from the typical warrant requirement under the long-standing exception for administrative searches of closely regulated industries.

The drug and alcohol testing program is also reasonable. Although one's urine, blood, or breath is searched, nothing but the object of the search is revealed. That fact makes drug testing one of the least intrusive types of searches. On the other hand, the governmental interest in ensuring safety on the rails is extremely important. It is senseless to jeopardize human life by failing to detect drug and alcohol abusers who operate this nation's railroads.

Amicus respectfully urges this Court to reverse the erroneous decision of the Ninth Circuit Court of Appeals in this matter.

DATED: July, 1988.

Respectfully submitted

RICHARD M. STEPHENS
Of Counsel
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ANTHONY T. CASO
*Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

*Attorneys for Amicus Curiae,
Pacific Legal Foundation*

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICI CURIAE OF THOMAS COLLEY,
ANN K. FINKBEINER, DENISE R. EVANS,
ANNE B. LACKMAN, HAROLD LACKMAN,
ERNEST H. BARRY, JR., ANNA KAMOLA,
ARTHUR W. JOHNSON, ANNE H. JOHNSON,
ROGER A. HORN, SUSAN HORN, MARY F. CLAY,
HARRY BAUER, AND LORE BAUER
IN SUPPORT OF PETITIONERS**

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
STEPHEN L. URBANCZYK

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

Hill Building
Washington, D.C. 20006
(202) 331-5000

Attorneys for Amici Curiae

(Attorneys of counsel continued inside cover)

* Counsel of Record

Of Counsel (continued):

WILLIAM C. SAMMONS

TYDINGS & ROSENBERG

201 North Charles Street

Baltimore, Maryland 21201

STANLEY J. GLOD

2323 Creek Drive

Alexandria, Virginia 22308

CHARLES I. APPLER

HAMEL & PARK

888 - 16th Street, N.W.

Washington, D.C. 20006

THOMAS L. BRIGHT

MARK, WEIGLE AND PERKINS

115 East King Street

Shippensburg, Pennsylvania 17257

ROBERT W. KATZ

GORDON, FEINBLATT, ROTHMAN,

HOFFBERGER & HOLLANDER

233 East Redwood Street

Baltimore, Maryland 21202

WILLIAM L. POPE

Post Office Box 944

Columbia, South Carolina 29202

BERTRAM D. FISHER

QUELLER, FISHER, BOWER

& WISOTSKY

110 Wall Street

New York, New York 10005

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. DRUG TESTING OF RAILROAD EMPLOYEES AND OTHERS ENTRUSTED WITH THE SAFETY OF THE PUBLIC IS NOT "UNREASONABLE" UNDER THE FOURTH AMENDMENT	9
A. The Public's Overwhelming Safety Interest Amply Justifies These Drug Tests	9
B. The Circumstances of a Railroad Accident Make a Warrant Unnecessary and Impracticable	16
C. When Employment Entails the Operation of Dangerous Vehicles That Puts the Public Safety at Risk, No Particularized Suspicion Need Be Shown	21
II. DRUG TESTING BY RAILROADS OF THEIR OPERATING EMPLOYEES DOES NOT EVEN IMPLICATE THE FOURTH AMENDMENT	22
A. The Fourth Amendment Has No Application to Drug Tests Consented to as a Condition of Employment	22
B. Tests of Breath or Urine Do Not Fall Within the Scope of the Fourth Amendment	24
C. The Fourth Amendment Does Not Apply to Drug Tests Required by Privately Owned Railroad Companies Without Governmental Compulsion	27
CONCLUSION	30

TABLE OF CONTENTS—Continued

	Page
APPENDICES	1a
A. Excerpt from transcript, <i>State v. Gates</i> , No. 87-CR-2120, Circuit Court, Baltimore County, Maryland, February 16, 1988	1a
B. Excerpt from Report of the National Transportation Safety Board on the Collision at Chase, Maryland, January 4, 1987	4a
C. Excerpt from deposition of Ricky L. Gates, <i>In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation</i> , MDL No. 728, U.S.D.C., D. Md., March 24, 1988	25a
D. Excerpt from transcript, <i>In re Special Investigation</i> , Grand Jury, Baltimore County, Maryland, May 1, 1987	31a
E. Excerpt from <i>Developments in Drug and Alcohol Testing</i> , Transcript of Hearing Before the Committee on Commerce, Science and Transportation, United States Senate, February 25, 1988	33a
F. Federal Railroad Administration, Accident Investigation Update, Feb. 23, 1988	36a

TABLE OF AUTHORITIES

Cases:	Page
<i>Anable v. Ford</i> , 653 F. Supp. 22 (W.D. Ark. 1985) ..	26
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	9
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982)	28
<i>Brotherhood of Locomotive Engineers v. Burlington Northern R.R.</i> , 838 F.2d 1087 (9th Cir. 1988), <i>pet'n for cert. pending</i> , No. 87-1631	22, 27, 29, 30
<i>Brotherhood of Locomotive Engineers v. Burlington Northern R.R.</i> , 838 F.2d 1102 (9th Cir. 1988)	22, 29, 30
<i>Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R.</i> , 802 F.2d 1016 (8th Cir. 1986)	29
<i>Burnett v. Municipality of Anchorage</i> , 806 F.2d 1447 (9th Cir. 1986)	25
<i>Cady v. Dombrowski</i> , 413 U.S. 433 (1973)	18
<i>California v. Greenwood</i> , 108 S. Ct. 1625 (1988) ..	8, 15, 24
<i>Capua v. City of Plainfield</i> , 643 F. Supp. 1507 (D. N.J. 1986)	25
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	9
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	8, 20
<i>Child Labor Tax Case</i> , 259 U.S. 20 (1922)	16
<i>Colonnade Catering Corp. v. United States</i> , 397 U.S. 72 (1970)	21
<i>Colorado v. Bertine</i> , 107 S. Ct. 738 (1987)	18
<i>Committee for GI Rights v. Callaway</i> , 518 F.2d 466 (D.C. Cir. 1975)	7, 15, 19
<i>Connick v. Myers</i> , 461 U.S. 138 (1983)	23
<i>Cupp v. Murphy</i> , 412 U.S. 291 (1973)	26
<i>Davis v. United States</i> , 328 U.S. 582 (1946)	22
<i>Department of the Navy v. Egan</i> , 108 S. Ct. 818 (1988)	23
<i>Division 241 v. Suscy</i> , 538 F.2d 1264 (7th Cir.), <i>cert. denied</i> , 429 U.S. 1029 (1976)	19
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981)	22
<i>Everett v. Napper</i> , 833 F.2d 1507 (11th Cir. 1987) ..	25
<i>Greco v. Halliburton Co.</i> , 674 F. Supp. 1447 (D. Wyo. 1987)	28
<i>Haig v. Agee</i> , 453 U.S. 280 (1981)	16

TABLE OF AUTHORITIES—Continued

	Page
<i>Illinois v. Lafayette</i> , 462 U.S. 640 (1983)	18
<i>International Brotherhood of Teamsters v. South- west Airlines Co.</i> , 842 F.2d 794 (5th Cir. 1988) ..	29
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974)	28
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1987), pet'n for cert. pending, No. 87-1706	19, 25
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	9
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963)	16
<i>Lovvorn v. City of Chattanooga</i> , 846 F.2d (6th Cir. 1988)	21, 26
<i>McDonell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987)	18, 25
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	7, 9
<i>New York v. Burger</i> , 107 S. Ct. 2636 (1987)	21
<i>O'Connor v. Ortega</i> , 107 S. Ct. 1492 (1987)	7, 9
<i>Penny v. Kennedy</i> , 846 F.2d 1563 (6th Cir. 1988) ..	21
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)	23
<i>Policemen's Benevolent Ass'n v. Township of Wash- ington</i> , — F.2d — (3d Cir. No. 87-5793, 1988)	18, 19, 20
<i>In re Rail Collision Near Chase, Maryland on Jan- uary 4, 1987 Litigation</i> , MDL No. 728, U.S.D.C., D. Md. (1987)	2, 10, 25a
<i>Railway Labor Executives' Ass'n v. Consolidated Rail Corp.</i> , 845 F.2d 1187 (3d Cir. 1988)	22, 29, 30
<i>Railway Labor Executives Ass'n v. Norfolk & Western Ry.</i> , 833 F.2d 700 (7th Cir. 1987)	29
<i>Rendell-Baker v. Kohn</i> , 457 U.S. 830 (1982)	28
<i>Rushton v. Nebraska Public Power Dist.</i> , 844 F.2d 562 (8th Cir. 1988)	7, 17, 18, 20
<i>Sala v. National Railroad Passenger Corp.</i> , No. 88- 1572, U.S.D.C., E.D. Pa. (1988)	2
<i>San Francisco Arts & Athletics, Inc. v. United States Olympic Committee</i> , 107 S. Ct. 2971 (1987)	28
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1964)	22

TABLE OF AUTHORITIES—Continued

	Page
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	17, 24, 25, 26
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973)	22
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986)	19
<i>Sibbach v. Wilson & Co.</i> , 312 U.S. 1 (1941)	22
<i>State v. Gates</i> , No. 87-CR-2420 (Cir. Ct., Balt. Cty., Md., 1988)	6, 1a
<i>United Public Workers v. Mitchell</i> , 330 U.S. 75 (1947)	23
<i>United States v. Biswell</i> , 406 U.S. 311 (1972)	21
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938)	23
<i>United States v. Davis</i> , 482 F.2d 893 (9th Cir. 1973)	27
<i>United States v. Gates</i> , No. R-88-116 (D. Md. 1988)	6, 18
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984)	15, 24, 27
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	21
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980) ..	22
<i>United States v. Place</i> , 462 U.S. 696 (1983)	24
<i>United States v. Rumely</i> , 345 U.S. 41 (1953)	16
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983)	15
<i>Warden v. Hayden</i> , 387 U.S. 294 (1967)	17
<i>Wyman v. James</i> , 400 U.S. 309 (1971)	23
<i>Zap v. United States</i> , 328 U.S. 624 (1946), va- cated, 330 U.S. 800 (1947)	22, 23
<i>Constitutional Provisions:</i>	
U.S. Constitution,	
First Amendment	22, 23
Fourth Amendment	7, passim
<i>Regulations and Administrative Documents:</i>	
48 Fed. Reg. 30723 (1983)	10
50 Fed. Reg. 31508 (1985)	10

TABLE OF AUTHORITIES—Continued

	Page
53 Fed. Reg. 8368 (1988)	14
53 Fed. Reg. 16640 (1988)	6
14 C.F.R. § 61	24
14 C.F.R. § 67	24
49 C.F.R. § 219.201 <i>et seq.</i>	16, 20, 29
49 C.F.R. § 219.301 <i>et seq.</i>	27-30

Miscellaneous:

<i>Developments in Drug and Alcohol Testing, HEARINGS BEFORE THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, U.S. SENATE (unpub. Feb. 25, 1988)</i>	15, 17, 33a
Feron, <i>5 Metro-North Workers in Crash Showed Drug Traces, U.S. Says</i> , N.Y. Times, May 11, 1988, p. A1, col 1	13, 14
Halloran, <i>Drug Use in Military Drops; Pervasive Testing Credited</i> , N.Y. Times, Apr. 23, 1987, p. A16, col. 1	7
McCord, <i>Tower Operator Won't Be Tried in Amtrak Crash</i> , Baltimore Sun, April 14, 1988, p. B1, col. 2	13
NATIONAL TRANSPORTATION SAFETY BOARD, RAILROAD ACCIDENT REPORT: REAR-END COLLISION OF AMTRAK PASSENGER TRAIN 94, THE COLONIAL, AND CONSOLIDATED RAIL CORPORATION FREIGHT TRAIN ENS-121, ON THE NORTHEAST CORRIDOR, CHASE, MARYLAND, JANUARY 4, 1987 (1988)	6, 4a
Stevens, <i>24 Hurt as Amtrak Train Derails; Search is On for Railroad Worker</i> , N.Y. Times, Jan. 30, 1988, p. 1, col. 3	13
UPI, <i>Prosecution Unsure of Conrail Dispatcher</i> , June 17, 1988	13
Zorzi, <i>Transportation Secretary Urges Airline Drug Testing</i> , Baltimore Sun, June 3, 1988, p. 10A, col. 1	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1555

JAMES H. BURNLEY, IV, *et al.*,
 Petitioners,
 v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
 Respondents.

On Writ of Certiorari to the United States
 Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THOMAS COLLEY,
 ANN K. FINKBEINER, DENISE R. EVANS,
 ANNE B. LACKMAN, HAROLD LACKMAN,
 ERNEST H. BARRY, JR., ANNA KAMOLA,
 ARTHUR W. JOHNSON, ANNE H. JOHNSON,
 ROGER A. HORN, SUSAN HORN, MARY F. CLAY,
 HARRY BAUER, AND LORE BAUER
 IN SUPPORT OF PETITIONERS

This brief *amici curiae* is filed by Thomas Colley, Ann K. Finkbeiner, Denise R. Evans, Anne B. Lackman, Harold Lackman, Ernest H. Barry, Jr., Anna Kamola, Arthur W. Johnson, Anne H. Johnson, Roger A. Horn, Susan Horn, Mary F. Clay, Harry Bauer, and Lore Bauer in support of petitioners.¹

INTEREST OF THE *AMICI CURIAE*

Amici are survivors of some of the sixteen persons who were killed on January 4, 1987 outside Baltimore, Maryland when a Conrail locomotive driven by a

¹ Petitioners and respondents have consented to the filing of this brief; their letters to that effect have been lodged with the Clerk.

marijuana-smoking engineer and brakeman ran stop signals and proceeded into the path of an Amtrak passenger train *en route* from Washington, D.C. to Boston.² The interest of the *amici* is in assuring that persons under the influence of drugs and alcohol not be permitted to operate or control trains, and that laws and regulations designed to take reasonable steps to prevent such unnecessary disasters not be struck down by judicial decisions, like the one of the United States Court of Appeals for the Ninth Circuit under review here, which fail to give adequate constitutional weight to the needs of public safety.

This brief emphasizes facts that document the prevalence and the consequences of drug use by railroad employees, and why it was reasonable for regulatory officials and railroads to conclude that drug testing is needed both to identify users and to ensure that such persons do not continue to have the lives of the public entrusted to them. *Amici* are only a handful of the general public of passengers who ought to be able to travel on public transportation without risk of such unreasonable and avoidable threats to their safety. *Amici* hope that in weighing the constitutional reasonableness of drug testing, this Court will recognize the legitimacy of efforts like the very minimal ones the court below nevertheless struck down here—efforts that are designed to make less likely that the pain and loss that *amici* live with as a result of irresponsible drug abuse by railroad employees will not be visited on other families whose members ride on passenger trains.

² *Amici* have been plaintiffs in consolidated actions arising out of that collision pending in the United States District Court for the District of Maryland. *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, D. Md. (1987). Counsel for *amici* were appointed by the District Court as lead counsel for the plaintiffs in those consolidated cases. Counsel for *amici* also represent persons injured in the 1988 collision near Chester, Pennsylvania referred to at pp. 12-13, *infra*. *Sala v. National Railroad Passenger Corp.*, No. 88-1572, U.S.D.C., E.D. Pa. (1988).

STATEMENT

Although superficially this case might appear a technical debate about abstractions of Fourth Amendment doctrine, it is not that at all. The real-world consequences of this Court's decision will quite literally affect issues of life and death. What this case really involves is not confined to policy directions of railroad corporations, or entries by governmental bodies in the *Federal Register*. Because of the pretrial discovery that occurred, one of the best documented instances of drug abuse by railroad employees and its effects is the collision last year in which *amici* lost members of their families. See J.A. 188-89. The facts that ought to be borne in mind in deciding this case include these:

On Sunday afternoon, January 4, 1987, at 12:35 p.m., the Amtrak *Colonial* left Union Station in Washington, D.C. After an intermediate stop in Baltimore, it was carrying approximately 650 passengers, many of them students returning to school and families traveling home after the holidays.

At 1:16 p.m. a train of three 136-ton Conrail locomotives left the Bayview Yard in Baltimore heading north on tracks that converged with the tracks used by Amtrak passenger trains in the busy Northeast Rail Corridor.

The Conrail train was driven by engineer Ricky Lynn Gates. Assisting him in the cab was brakeman Edward "Butch" Cromwell. Both Gates, the engineer, and Cromwell, the brakeman, were longtime habitual abusers of drugs and alcohol. As they applied power to the lead locomotive, sometimes exceeding speed limits, Gates and Cromwell took "hits" on a joint of marijuana, ignored signals, and watched the scenery. Although their duties required them to call out the wayside signals along the route, soon after leaving the yard they ceased to do so. As the engineer recalled the fatal trip:

Q. . . . What did you do when Mr. Cromwell pulled out the marijuana cigarette at about River?

A. He asked me if I wanted to smoke it then, and I told him it was his, it was up to him, that I would prefer if we were going to smoke anything, to wait until we got on the Port Road branch. . . .

* * *

A. The next thing I remember, we were still talking, I don't remember the exact nature of the conversation, we were still in the nature of complaining about the engines and him telling me something about the trip before then and his brother or something. And he put what was left of the joint into a pipe and he started lighting it up.

Q. At that point you had three hits on the joint?

A. I believe so, yes.

Q. And then he put the remains of the joint into a pipe; is that correct?

A. Yes.

Q. What did he do with that?

A. He lit it up. He passed it to me at one point, but it had gone out, and I could—I don't recall whether I either tasted it before I tried to light it, or I just smelled it, but I could smell the remnants of PCP in the pipe. And I handed it back to him more or less I was agitated about it, and I mentioned it to him, and he told me it was his girlfriend's pipe and she had probably smoked it.

Q. Does PCP have an odor?

A. Yes, like parsley flakes. That was the only experience I had ever had with it years before, and that is what it smelled like, and so that's what I assume it was.

* * *

Next thing I recall is through the conversation, I was running assuming we were going to go out or keep moving at Gunpow Interlocking, and I was trying to make, save as much time as I could, I pulled the throttle out a little more is the last thing I remember.

* * *

I know I was talking to Butch, I glanced at him. . . . I probably glanced at the speed indicator at

some point, the scenery around me and the signal. I was taking in quite a bit. (Pp. 25a-27a, *infra*.)

They continued at a speed in excess of 60 miles per hour, and ignored the wayside directions over nine miles. Neither Gates nor Cromwell was paying attention as the train ran through a series of SLOW and then STOP signals approaching the convergence with the track being used by the Amtrak passenger train at Chase, Maryland, just north of Baltimore.

At 1:30 p.m., Gates at last noticed what was happening. Cromwell jumped from the train. Gates in panic hit the emergency brakes, and tried to reverse the locomotives. But the Conrail train slid through the STOP signal and into the path of the Amtrak passenger train, which was approaching from behind at more than 100 miles per hour. P. 27a, *infra*. The impact was described by emergency callers as a "big explosion." P. 16a, *infra*. The National Transportation Safety Board found that

The rear Conrail unit was virtually disintegrated

....

The forward cab and superstructure of the lead Amtrak locomotive unit was crushed downward and inward to the underframe. Separated from the trucks, the remains of the car body came to rest west of the tracks about 400 feet north of the collision point. . . .

. . . After passing over the food service car, the second car came to rest on its side atop the rear of the trailing Amtrak locomotive unit. It was more or less perpendicular to the track, badly deformed and bent or crimped downward in the middle at an angle of about 30°

P. 5a, *infra*. The engineer of the Amtrak train and fifteen of its passengers—most of them children and young people—were killed. Pp. 1a-3a, *infra*. At least 174 other passengers were injured. P. 3a, *infra*, J.A. 188.

The National Transportation Safety Board after investigation and four days of hearings, in which thirty-three witnesses were heard, issued a determination

that the probable cause of this accident was the failure, as a result of impairment from marijuana, of the engineer of Conrail train ENS-121 to stop his train in compliance with home signal 1N before it fouled the No. 2 track at Gunpow³

It further recommended that Conrail "[i]mprove the methods of identifying employees who abuse alcohol and/or drugs,"⁴ and that the Federal Railroad Administration "[e]xpand and intensify its oversight of Amtrak's . . . compliance with Federal Safety Regulations (including the requirements for postaccident toxicological testing. . . ."⁵ The Federal Railroad Administration observed that the collision "illustrates the catastrophic consequences that can occur when railroad employees responsible for passengers or hazardous materials are under the influence of drugs." 53 Fed. Reg. 16640, 16641 (1988).⁶

SUMMARY OF ARGUMENT

The regulations and policies that the unions challenge in this case were designed to help safeguard in a limited way—indeed, a not fully adequate way⁷—the public

³ NATIONAL TRANSPORTATION SAFETY BOARD, RAILROAD ACCIDENT REPORT: REAR-END COLLISION OF AMTRAK PASSENGER TRAIN 94, THE COLONIAL, AND CONSOLIDATED RAIL CORPORATION FREIGHT TRAIN ENS-121, ON THE NORTHEAST CORRIDOR, CHASE, MARYLAND, JANUARY 4, 1987 (1988) (hereinafter cited as "NTSB Report"), pp. 23a-24a, *infra*.

⁴ *Id.* at 24a.

⁵ *Ibid.*

⁶ Gates pleaded guilty to manslaughter. *State v. Gates*, No. 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988, p. 1a, *infra*. Thereafter he also pleaded guilty to obstructing the National Transportation Safety Board investigation by lying to investigators. *United States v. Gates*, No. R-88-116, D. Md. 1988.

⁷ The Federal Railroad Administration on May 10 of this year issued a notice of proposed rulemaking that would establish a system of random drug tests for railroad employees. 53 Fed. Reg. 16640 (1988). *Amici* believe that the same overwhelming concerns of safety that provide constitutional support for the limited testing at issue here also amply support such random testing. Random

safety. They were adopted in response to well documented evidence, and findings by responsible governmental agencies, that drug and alcohol abuse by the employees who operate and direct locomotives and trains on this country's railroads constitutes a serious danger to the public. If not curtailed, drug and alcohol abuse by railroad employees will continue to cost lives and vast amounts of damage.⁸

Even if the Fourth Amendment is applicable to this testing program—and, for reasons stated at pp. 22-30, *infra*, *amici* submit that it is not—that Amendment in terms and by this Court's decisions prohibits only searches and seizures that are "unreasonable." *E.g.*, *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The testing challenged here is not unreasonable. Indeed, given the hazards to the public and what is now established about drug and alcohol abuse by railroad employees, *e.g.*, J.A. 187-88, 193-203, any policy would be unreasonable and inexcusable that did not require drug testing. The decisions of the expert federal agency and the operating railroads to require such testing as one means of making such accidents less likely are am-

drug testing has been upheld on many occasions for employees on whom the safety of others depends. See, *e.g.*, *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (employees at nuclear power plant). According to the experience of the military services, the fact of testing is in itself a significant deterrent to drug use. See Halloran, *Drug Use in Military Drops; Pervasive Testing Credited*, N.Y. Times, Apr. 23, 1987, p. A16, col. 1; *cf.* *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975). See also 53 Fed. Reg. 8368, 8386 (1988) (Federal Aviation Administration notice of proposed rulemaking to require post-accident drug testing). The record here supports the same conclusion. J.A. 189.

⁸ The monetary cost of the damage the regulations and policies seek to avoid is also gigantic. Apart from what the National Transportation Safety Board estimated as \$16,561,000 damage to vehicles and railroad property, p. 7a, *infra*, as a result of the single collision referred to, Conrail made settlement payments exceeding \$58 million to wrongful-death claimants and \$6 million to others; a number of additional damage claims are unsettled and pending.

ply supported by vast and unfortunately recurring evidence, and wholly consistent with a practical and urgent need. The split decision of the Court of Appeals below, that invalidated both the federally required and the private sector safety rules on constitutional grounds, really amounts to an unauthorized judicial second-guessing of both agency policy and private discretion in a manner that this Court rejected in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Court of Appeals majority gave dominant weight to what it called railroad operators' "legitimate expectations of privacy in the integrity of their bodies." Pet. Cert. 21a. But as this Court explained two months ago, "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *California v. Greenwood*, 108 S. Ct. 1625, 1628 (1988). The absolutist privacy interest asserted by the unions here is not compatible with the rule of reason established by the text of the Fourth Amendment, and is not by any stretch "objectively reasonable."

Moreover, no one required the members of the respondent unions to accept the well paid and responsible jobs they hold. They voluntarily made that choice. Persons in occupations like theirs, who have the safety of the public thus entrusted to their care, cannot claim the same interest as others in preventing reasonable testing, in the employment context, designed to identify irresponsible and dangerous use of drugs and alcohol. And insofar as some of the challenged testing programs are merely optional, at the option of the private railroads (who are not even parties to this case), a Fourth Amendment challenge to those privately instituted programs must fail on familiar doctrine that the Constitution generally limits only governmental, and not private, action.

The "integrity of their bodies" of railroad employees, which the majority of the Court of Appeals envisioned

as being so dispositive here, weighs little against the interest in preserving the integrity of the bodies of passengers—and, indeed, fellow railroad workers—who are at risk of being killed or maimed as a result of drug and alcohol abuse by railroad employees. Nothing can bring back the members of *amici's* families, who lost their lives to a train operated by a drug-abusing engineer and brakeman. This Court's decision should not block reasonable efforts either by railroads, or by other passenger and freight carriers, or by the Government to make it less likely that such senseless and avoidable bereavements occur again.

ARGUMENT

I. DRUG TESTING OF RAILROAD EMPLOYEES AND OTHERS ENTRUSTED WITH THE SAFETY OF THE PUBLIC IS NOT "UNREASONABLE" UNDER THE FOURTH AMENDMENT.

The Fourth Amendment is one of the most flexible provisions of the Constitution. Unlike other clauses of the Bill of Rights which speak at least textually in absolute terms, the Fourth Amendment was drafted from the beginning to make clear that the only searches and seizures it prohibits are those that, all things considered, and in the light of actual and present-day necessities and dangers, are "unreasonable." The Fourth Amendment sets forth a rule of reason and practicality. *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). "The Fourth Amendment prohibits only unreasonable searches, *Carroll v. United States*, 267 U.S. 132, 147 (1925)" *Bell v. Wolfish*, 441 U.S. 520, 558 (1979). "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Katz v. United States*, 389 U.S. 347, 350 (1967).

A. The Public's Overwhelming Safety Interest Amply Justifies These Drug Tests.

A visitor from a far-away place surely could not help but be astounded at the Ninth Circuit's constitutional holding here. Two judges, constituting a majority of the

Court of Appeals panel, held that the United States Constitution forbids an employer, absent "particularized suspicion," to test for drugs employees who are entrusted with duties hazardous to themselves and others, in an environment of well-documented frequent use of drugs. *Even after two trains collide*, the majority below held, railroads may not enforce policies, and the Government may not enforce regulations, designed narrowly to determine whether the train operators used drugs. The Court of Appeals held this, moreover, while acknowledging that "The FRA undertook this rulemaking process in response to a perception that drug and alcohol abuse is a serious problem in the railroad industry posing unacceptable risks to public and employee safety." Pet. Cert. at 12a-13a.⁹ The Ninth Circuit's holding lacks any precedent and is simply bizarre.

Exactly how reasonable such testing is, and exactly how disastrous drug use by railroad employees can be, is vividly demonstrated in the record of the train collision outside Baltimore last year in which *amici's* children or relatives were killed. As the drug-using engineer, who survived the crash with minor injury, later testified:¹⁰

Q. How frequently were you using marijuana at this point in time?

A. Maybe once or twice a week.

* * *

Q. For what period of time had you been using marijuana at this rate?

A. Since about the age of 18.

* * *

⁹ The Federal Railroad Administrator in 1983 found that "Alcohol impairment and drug impairment have been identified as causal or contributing factors in a number of train accidents and employee fatalities over the past ten years." 48 Fed. Reg. 30723 (1983); see also 50 Fed. Reg. 31508 (1985).

¹⁰ The quoted testimony is from his deposition in consolidated civil actions arising out of the collision. *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, U.S.D.C., D. Md.

Again, I might add I am subject to blackouts under the influence of drugs and alcohol. (Pp. 28a-30a, *infra*.)

Such drug and alcohol abuse, both on and off the job, by these railroad employees and by railroad operators generally was nothing new or unique. The engineer testified:

Q. Did you ever use marijuana or any other illegal drugs with any of your Conrail co-workers?

A. Yes.

Q. The answer is yes?

A. Yes.

Q. On how many occasions?

A. I don't know.

* * *

Q. How frequently did you use marijuana with your Conrail co-workers in 1986?

A. I can't recall any—I don't know how to answer it as far as frequency goes, but it was a number of times.

Q. More than ten?

A. Probably.

Q. More than 20?

A. Maybe. (Pp. 29a-30a, *infra*.)

The brakeman testified that this was not the first time that he and the engineer had operated a locomotive while smoking marijuana. Pp. 31a-32a, *infra*.¹¹

¹¹ The engineer also admitted constant abuse of alcohol:

Q. What quantities were you normally drinking alcohol?

A. Anywhere from a minimum of a six-pack a day to a case and a half, two cases a day.

Q. A six-pack to a case or two cases a day; is that correct?

A. Sometimes, yes.

Q. And what was your average consumption? Was it closer to one case?

A. Average consumption was close to a case, yes.

MR. SANSFIELD: What was the answer to that? Average consumption was what?

[Continued]

Nor was this crash, which devastated sixteen families and caused pain and hardship for many others, an isolated event. The list since that time has grown steadily longer, and new drug-related railroad crashes have occurred even since *amici* filed their earlier brief in this Court three months ago. See generally J.A. 196-203. An incomplete sampling of some of the more publicized events includes these:

—On November 8, 1987, two Union Pacific freight trains collided head-on near Kemmerer, Wyoming after one of them ran a stop signal. A conductor was killed and six crew members injured. The front brakeman on the train that ran the signal tested positively for cocaine in his blood and urine. See J.A. 203.

—On January 29, 1988, near Chester, Pennsylvania, an Amtrak passenger train plowed into a railroad maintenance-of-way vehicle on the tracks ahead of it. At least nineteen persons were injured. The operator of the switch which should have stopped the train hid from authorities for three days; when he gave himself up and was tested, his urine still showed positive for use of four different drugs: marijuana, cocaine, methamphetamine, and amphetamine. See pp. 36a-38a, *infra*. The local dis-

¹¹ [Continued]

A. Probably close to a case of beer a day.

Q. It was that pretty much every day?

A. Almost every day, yes.

Q. And by a case of beer, of course, we are referring to 24, 12-ounce cans of beer; is that correct?

A. Yes.

Q. For what period of time had you been consuming alcohol at that rate of almost a case a day, or over a case a day?

A. I would say for close to a year at that time.

Q. And during what times of day would you do your drinking?

A. Any time.

Q. What time of day would you start drinking?

A. Any time.

P. 28a, *infra*. The engineer testified to having once been sent to drive a locomotive when he said he was too drunk to drive an automobile. Pp. 33a-34a, *infra*.

trict attorney announced that because of the delay before the tests could be administered, it was impossible to prove the timing of the usage in relation to the collision, and so no criminal charges would be filed.¹²

—On April 6, 1988, a commuter train ran a stop signal and plowed into the back of another commuter train in Mount Vernon, New York. The body of the engineer, who was killed in the crash, showed traces of marijuana. In addition, three tower operators and the dispatcher in New York City showed traces of drugs when tested: amphetamines in the cases of two of the tower operators, marijuana for the third, and morphine and codeine for the dispatcher.¹³

—On May 21, 1988, two Conrail trains collided head-on in Fair Lawn, New Jersey. A brakeman on one of them was killed. A dispatcher had put both trains on the same track. He was tested for drugs and found positive for use of marijuana.¹⁴

—A week prior to that collision, the Federal Railroad Administrator had stated that since the crash in which *amici*'s children or relatives were killed,

the nation's railroads experienced 37 accidents where one or more employees tested positive for drugs and four in which one or more employees tested positive for alcohol.

Over the last 16 months, Mr. Riley said, "we've averaged one major rail accident every 10 days in which alcohol or drug abuse was discovered, with more than 375 people killed or injured in those accidents.

¹² See McCord, *Tower Operator Won't Be Tried in Amtrak Crash*, Baltimore Sun, April 14, 1988, p. 81, col. 2; Stevens, *24 Hurt as Amtrak Train Derails; Search is On for Railroad Worker*, N.Y. Times, Jan. 30, 1988, p. 1, col. 3.

¹³ Feron, *5 Metro-North Workers in Crash Showed Drug Traces*, U.S. Says, N.Y. Times, May 11, 1988, p. A1, col. 1 (emphasis supplied).

¹⁴ UPI dispatch, *Prosecutor Unsure on Conrail Dispatcher*, June 17, 1988.

"We have found drug-positive results in one of every five railroad accidents we've tested in the last two years, and 65 percent of our fatalities occurred in accidents where one or more employees tested positive for alcohol or drugs."¹⁵

The Federal Railway Administration earlier this year reported:

During the thirteen-month period January 1987 through January 1988, the nation's railroads experienced 41 accidents (including Chase, Maryland) in which one or more employees tested positive for alcohol or illegal drugs. Alcohol or drug use by one or more employees was detected in over 20% of qualifying events for post-accident testing. FRA believes that there are significant indications that alcohol or drug use played a causal or contributory role in 13 of these events, accounting for 19 fatalities, 220 injuries and \$19,956,000 in property damage. Of the 13 events, illicit drug use was present in 10 and alcohol use in only 3, despite estimates at the time the current rule was issued that alcohol prevalence and drug use prevalence were roughly equal. The 10 accidents involving drug positives accounted for 18 fatalities, 220 injuries, and \$18,725,628 in property damage.

53 Fed. Reg. 16640, 16641 (1988). See also J.A. 187-88, 193-203.

It is impossible, given the documented risk, to understand how any asserted privacy interest that the railroad unions claim in the contents of samples of their members' urine or breath—or even medical samples of their blood—could begin to compare with the obvious and overriding interest of the traveling public in having some assurance that common carrier vehicles are not being operated by unspeakably irresponsible persons who find it "enjoyable" while on duty to light up marijuana while "glanc[ing] at the speed indicator [and] . . . the scenery" and "pull[ing] out the throttle." Pp. 26a-27a, *infra*.¹⁶

¹⁵ Feron, *supra* n.13 (emphasis supplied).

¹⁶ Even the Air Line Pilots Association, although opposing drug testing of pilots generally, at least supports post-accident testing,

The Court of Appeals majority, unimpressed by such dangers, said it gave great weight to train operators' "legitimate expectations of privacy in the integrity of their bodies." Pet. Cert. 21a. But that is a conclusion, not a rationale. "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *California v. Greenwood*, 108 S. Ct. 1625, 1628 (1988). "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." *United States v. Jacobsen*, 466 U.S. 109, 122 (1984) (footnote omitted). In the context of hazards of this magnitude, and in the employment setting, there was no legitimate expectation of privacy here sufficient to overcome such a limited and necessary testing.¹⁷ The dissent below pointed

pre-employment testing, and testing to monitor rehabilitation. See Zorzi, *Transportation Secretary Urges Airline Drug Testing*, Baltimore Sun, June 3, 1988, p. 10A, col. 1. The railroad unions' adamant claims of a constitutional privilege on behalf of their members is all the more shocking in light of the significant number of drug-caused fatalities to railroad workers themselves. One of the present amici is the widow of the engineer of the Amtrak train into whose path the Conrail train was driven. See p. 1a, *infra*.

Moreover, the unions' position is far from consistent. On February 25, 1988, counsel of record for respondents testified on their behalf before the Committee on Commerce, Science and Transportation of the United States Senate. He stated in that testimony:

SENATOR DANFORTH: Mr. Mann, you do not object to drug testing except random testing, is that right?

MR. MANN: That is correct.

P. 35a, *infra*.

¹⁷ Cf. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (governmental interest in assuring compliance with documentation requirements permits limited intrusion of boarding vessels); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975) (holding Fourth Amendment does not bar urinalysis testing for drugs of members of the armed forces, noting that "[w]idespread use of marijuana, hashish and other drugs can have a serious

out the obvious: "the incalculable risk to public safety posed by alcohol or drug impaired train crews." Pet. Cert. at 37a. The suffering of *amici* is unfortunately only one of the recent fatal instances, demonstrating that without effective control of railroad employees' drug use, the risk becomes for some number of passengers and fellow workers a statistical certainty.

The majority in the Court of Appeals, unfortunately, ignored the heart of the Fourth Amendment—that it is a rule of reason—and engaged in an abstract and other-worldly analysis reminiscent of the most refined medieval doctrinal disputes, as if all that were at stake here were the admission of some disputed evidence at a criminal trial. The practical leaders of the Eighteenth Century who wrote and adopted the Fourth Amendment simply could not have intended to erect such a constitutional barrier to such a minimal administrative step to help ensure the public safety. In this context as in others, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig v. Agee*, 453 U.S. 280, 309-10 (1981), quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). To disallow on constitutional grounds the testing for drug use of operators of hazardous equipment, "we would have to be that 'blind' Court, against which Mr. Chief Justice Taft admonished in a famous passage, *Child Labor Tax Case*, 259 U.S. 20, 37 [1922], that does not see what '[a]ll others can see and understand'. . . ." *United States v. Rumely*, 345 U.S. 41, 44 (1953).

B. The Circumstances of a Railroad Accident Make a Warrant Unnecessary and Impracticable.

Subpart C of the regulation, 49 C.F.R. § 219.201 *et seq.*—the portion which is mandatory and imposed by governmental action—requires prompt urine and blood testing of railroad employees who are involved in serious

debilitating effect on the ability of the Armed Services to perform their mission").

accidents. Surely the existence of such an event—like the collision in which *amici*'s children or other relatives were killed—would be obviously sufficient in itself to supply "probable cause" for the issuance of a warrant to make a reasonable search. Cf., e.g., *Schmerber v. California*, 384 U.S. 757 (1966) (automobile accident provided probable cause for blood test). Issuing a warrant in such circumstances, if there were time to get one and serve it, would be virtually a ministerial act. But there is likely to be no time in the confusion after an accident promptly to obtain a warrant.

Drug metabolites or alcohol in blood, breath or urine diminish rapidly in quality as time passes, and the ability to tie them directly to impairment recedes. A triggering event thus may supply the exigent basis for a warrantless search. *Schmerber v. California*, *supra*, 384 U.S. at 769-70 (imminent destruction of evidence); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967) (pursuit of fleeing suspect). The Court of Appeals itself appeared to recognize this. Pet. Cert. 16a. See also J.A. 190-91.

Nor can it be expected that railroad employees who in fact have used such substances will cooperate and make themselves available over an extended period of time. They have every incentive to cover up their wrongdoing. As one court of appeals recently commented, "[t]here was expert testimony at trial that a drug abuser would do just about anything to avoid detection." *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988). After the collision in which *amici*'s relatives were killed, the engineer testified that "I have never known anyone to turn themselves in." P. 35a, *infra*. The dispatcher in one crash fled and hid for three days to avoid drug testing. It was later also admitted that the brakeman in the Chase, Maryland crash, even though encumbered by a broken leg, managed to flee the scene of the accident and hide the pipe in which he had been smoking marijuana in some brush along the track; it was never found. The engineer delayed testing by refusing an offer of a ride to the hospital. Neither he nor the brakeman

revealed their drug use to authorities in the hours after the accident. In fact, they met and agreed to lie and deny that they had used drugs.¹⁸ Without post-accident tests, their use never would have been detected. It was only after testing their blood and urine that the drug use in the case began to come out. See also J.A. 188-89.

Given the time constraints and the ephemeral nature of the essential evidence required, there simply are no adequate less intrusive alternatives to these testing measures. Some alternatives—such as following employees around and spying on them—would be less workable and far more intrusive. The reasonableness of testing after a major accident is obvious. And even if there were practical alternatives, that would not in itself render the decision by the FRA or the railroads to choose the policy they did “unreasonable” under the Fourth Amendment. “The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means.” *Colorado v. Bertine*, 107 S.Ct. 738, 742 (1987), quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). “The fact that the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means does not, by itself, render the search unreasonable.” *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).

The ruling of the Court of Appeals majority here conflicts with the decisions of many other courts that have upheld drug testing of workers in jobs affecting the public safety, against Fourth Amendment challenges. See *Policeman's Benevolent Ass'n v. Township of Washington*, — F.2d — (3d Cir. No. 87-5793, 1988) (police officers); *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (employees in state nuclear power plant); *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir.

¹⁸ The engineer later lied about it to investigators of the National Transportation Safety Board, for which he subsequently was indicted and pleaded guilty to obstruction of a federal investigation. *United States v. Gates*, No. R-88-116 (D. Md. 1988).

1987) (prison guards); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) (members of the armed forces). It has been held that there is no constitutional bar to testing operators of buses that run within a metropolitan area, *Division 241 v. Suscy*, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); the need to test operators of interurban trains is surely no less. The D.C. Circuit has acknowledged that because of “serious safety concerns” appropriate routine drug tests may be required not just of drivers, but of school bus attendants as well. *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C. Cir. 1987) (emphasis in original), pet'n for cert. pending, No. 87-1706. And if there is no constitutional prohibition to testing of racetrack jockeys—where the interest asserted to justify the tests is merely that of horse race bettors and spectators in “preserving both the fact and the appearance of integrity of the racing performances”—then surely the interest of the public in transportation safety is sufficient to prevail here. See *Shoemaker v. Handel*, 795 F.2d 1136, 1138 (3d Cir.), cert. denied, 479 U.S. 986 (1986).¹⁹

The Ninth Circuit, acknowledging that “our decision may be seen as conflicting with decisions of other circuits,” Pet. Cert. 30a, nevertheless announced a different constitutional conclusion of its own. It decided that

We think when testing is undertaken to detect drug or alcohol abuse as a means of improving the safe operation of a railroad, it poses no insuperable burden on the government to require individualized suspicion. . . . [W]e believe it [a requirement of individual suspicion] should be incorporated into

¹⁹ Cf. *Policeman's Benevolent Ass'n v. Township of Washington*, — F.2d — (3d Cir. No. 87-5793, 1988) (upholding drug testing of police officers): “The need in a democratic society for public confidence, respect and approbation of the public officials on whom the state confers that awesome [law enforcement] power is significantly greater than the state's need to instill confidence in the integrity of the horse racing industry.” Slip op. at 20.

the mandatory testing provisions set out in 49 C.F.R. § 219.201

Pet. Cert. 26a-27a (emphasis added).

The constitutional, not to mention the factual, authority for the "We think," the "we believe," and the "should be" in the court's edict is impossible to discern. For a court thus to reweigh the policy pros and cons, and thereby reach such a policy conclusion that rejects the determination of both the expert federal agencies set up by Congress, and the private enterprises that operate the railroads, is really an unauthorized kind of judicial review of agency weighing of competing interests. It stands in sharp contrast with, for example, this Court's holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . ." 467 U.S. at 866. The courts of course are the ultimate arbiters of the meaning of the Constitution; but the Fourth Amendment clearly recognizes the need for intrusions on privacy in circumstances too variable to try to list, and contemplates that, here particularly, governmental decisions are to be given reasonable leeway. The Fourth Amendment was not a charter to the Ninth Circuit to second-guess how the railroads should be run. On this record the Ninth Circuit's decision to reject the regulation was not only amazingly unwise policy; it was wholly beyond the court's proper function.

Of three circuits ruling on drug testing subsequent to the decision under review here, two explicitly disagreed with it. *Policeman's Benevolent Ass'n v. Township of Washington*, — F.2d — (3d Cir. No. 87-5793, 1988); *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988). In the other, a 2-1 decision of the Sixth Circuit involving firefighters, one of the two judges of the majority announced that

I do not consider the "potential," "significant," or "irretrievable harm" that might be visited upon society by drug-using public employees to be proper justification for a search.

Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1551 (6th Cir. 1988) (Johnstone, J., concurring).²⁰ That statement makes explicit what is perhaps implicit in the decision of the Ninth Circuit under review here. *Amici* respectfully submit that, particularly in the context of reasonableness established as the test by the Fourth Amendment, that statement is shocking and wrong.

C. When Employment Entails the Operation of Dangerous Vehicles That Put the Public Safety at Risk, No Particularized Suspicion Need Be Shown.

Although "some quantum of individualized suspicion is usually a prerequisite . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976). *New York v. Burger*, 107 S. Ct. 2636 (1987), upholding warrantless searches of automobile junkyards, is simply the latest in a long series of decisions in which this Court has recognized the validity under the Fourth Amendment of searches that are obviously related to the regulation or operation of an ongoing enterprise. See also, e.g., *United States v. Biswell*, 406 U.S. 311 (1972) (pawn shop); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (caterer).

Moreover, this case does not involve intrusions on individuals' homes; it has to do with their job performance. The Fourth Amendment's limitations are always less stringent in the business and commercial context. See,

²⁰ Even the Sixth Circuit recognized in a companion case that "attention must be focused on the nature of the work force," and "[t]he higher the costs and more irretrievable the losses, the stronger the argument for finding reasonable the initiation of a drug testing program," particularly in "employment sectors where employees literally hold thousands of lives in their hands everyday." *Penny v. Kennedy*, 846 F.2d 1563, 1566 (6th Cir. 1988).

e.g., *Donovan v. Dewey*, 452 U.S. 594, 598-600 (1981); *Davis v. United States*, 328 U.S. 582, 593 (1946). Activities in commerce are at issue here. The present litigation is brought by labor unions. It asserts a constitutional challenge to the nature of one aspect of working conditions, even though elsewhere, in other litigation, unions are challenging the railroad drug testing program simply as a violation of labor laws and collective bargaining agreements.²¹

II. DRUG TESTING BY RAILROADS OF THEIR OPERATING EMPLOYEES DOES NOT EVEN IMPLICATE THE FOURTH AMENDMENT.

The Fourth Amendment does not apply to the tests challenged here at all.

A. The Fourth Amendment Has No Application to Drug Tests Consented to as a Condition of Employment.

Consent to a search of course waives any Fourth Amendment objection. "[A] search authorized by consent is wholly valid." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); see also *United States v. Mendenhall*, 446 U.S. 544 (1980); *Davis v. United States*, 328 U.S. 582 (1946); *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). In many contexts it has long been established that the conferral of benefits, such as responsible employment, may be reasonably conditioned upon the recipient's limiting some rights that a member of the general public would enjoy undiminished.²² Such conditioning has been

²¹ See *Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1102 (9th Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet'n for cert. pending*, No. 87-1631.

²² Cf. *Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (party in civil action may be required to undergo physical or mental examination as a condition of suing).

upheld even when the general rights modified involved core First Amendment values of political expression. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Background investigations, for example, are far more intrusive, but because the country's safety is at stake are routinely required of both government and private employees as a condition of access to military secrets. See *Department of the Navy v. Egan*, 108 S.Ct. 818, 824 (1988).

Where the purpose of a search is directly and inextricably bound up with the ability to perform the duties undertaken, then consent can be recognized. Even in the context of First Amendment expression, where the constitutional test is far stricter, cf. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), "[t]he problem in any case is to arrive at a balance" *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); cf. *Department of the Navy v. Egan*, *supra*.

Even more readily than in the First Amendment context, this Court has recognized the applicability of this common-sense rule to the more flexible provisions of the Fourth Amendment. In *Wyman v. James*, 400 U.S. 309 (1971), it held that the Fourth Amendment did not apply to home visits by welfare officials where refusal to consent would lead to denial of benefits; and in *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947), a defense contractor was held barred to raise the Fourth Amendment when it had opened its books and records as a condition to obtaining government contracts.

Even if one assumed that the constitutional restraints applicable to terms of government employment could be translated to the situation of privately employed railroad operators, it certainly is not an unreasonable condition for employment—as an operator of lethal devices—to require submission to tests to detect use of substances that impair the very same physical and mental qualities necessary to operate such equipment with safety. It is

no more objectionable or unreasonable than to condition the grant of licenses to airplane pilots on periodic tests to ensure that they are not losing their vision. See 14 C.F.R. §§ 61.23, 67.13-19.

B. Tests of Breath or Urine Do Not Fall Within the Scope of the Fourth Amendment.

This Court has never ruled that an examination of exhaled breath or excreted urine, waste products of the respiratory and metabolic processes, falls within the Fourth Amendment. The general rule is that searches of abandoned waste material do not. *California v. Greenwood*, 108 S. Ct. 1625 (1988). Breath and urine tests, unlike blood tests, do not involve "intrusions into the human body." See *Schmerber v. California*, 384 U.S. 757, 767 (1966). Nor does either require the subject to expose private parts in public. The assertion by the Court of Appeals here, citing district court cases, that "urinalyses and body cavity searches [are] equally degrading," Pet. Cert. 23a, is simply absurd, reflecting, no doubt, little experience with either. And surely no one can seriously suggest that a warrant and probable cause are required to smell someone's breath.

That breath analysis and, by extension, urinalysis are not searches within the Fourth Amendment is clear from this Court's reasoning in *United States v. Place*, 462 U.S. 696 (1983), which so held with respect to "sniff tests" of luggage by dogs. Citing and quoting *Place* with approval, this Court in *United States v. Jacobsen*, 466 U.S. 109, 123 (1984), added that chemical tests to determine whether a substance contains drugs do "not compromise any legitimate interest in privacy."

The Court of Appeals in order to justify reference to the Fourth Amendment simply cited a series of lower court opinions—for the most part dicta—that ignored *United States v. Place* and extrapolated from this Court's decision in *Schmerber*, *supra*, which held that inserting a needle into the body and drawing blood was—obviously—a kind of search. All those cases pretended that this

Court in *Schmerber* had already decided the question. The Eleventh Circuit, for example, assumed a urinalysis to be a search because "[t]his is consistent with rulings like that of the Supreme Court [in *Schmerber*] that the taking of a blood sample is a search." *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987). Forgetting the far different physical nature of the process by which a blood sample is obtained, and the differences between blood and waste products, the dicta on which the court below relied really seem to say that urine samples like blood samples are both analyzed in laboratories, and so therefore the Fourth Amendment must apply to each. Cf., e.g., *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *pet'n for cert. pending*, No. 87-1706; *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987).²³ Although the court below similarly asserted that *Schmerber* somehow settled the matter, this Court, of course, has never held any such thing.

Likewise, some lower courts that have taken the further leap of assuming breath tests to be "searches" implicating the Fourth Amendment have done so almost exclusively by again making inappropriate analogy to *Schmerber v. California*, *supra*. Yet breath is not something wholly internal to the body. It is something expelled and made public nearly twenty times every minute. Using such loose reasoning, the Ninth Circuit's own previous decision, relied on below, in *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986), cited *only* to *Schmerber* in finding that a breath test constitutes a search, *id.* at 1449, even though acknowledging that "the breath test . . . is clearly a less objectionable intrusion

²³ *Jones v. McKenzie* indeed recognized that "urine, unlike blood, is routinely discharged from the body so that no actual (physical) intrusion is required for its collection . . ." and "[u]rinalysis properly administered is not as intrusive as a strip search or a blood test." 809 F.2d at 1307-08 (quoting *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986)).

than the compulsory blood samples allowed under *Schmerber*." *Id.* at 1450.²⁴

The point has been made exceedingly well by the dissenting judge in the *Lovvorn* case, previously cited:

Although the majority of drug testing cases have stated or assumed that a search is involved, I suggest that that is not *necessarily* the case. If an employer without consent were to remove urine with a catheter from the bodies of employees, just as the blood sample was removed by a needle in *Schmerber*, I would agree that this is a search. However, if the employee is asked to donate a urine sample and surrender it to the employer for analysis, is that a search? I would conclude it is not for the simplest of reasons. It does not comport with any commonly accepted definition of the word "search." 846 F.2d at 1552 (Guy, J., dissenting) (emphasis in original; footnote omitted).²⁵

What the existing accumulation of lower-court urinalysis and breathanalysis cases really represents is not a body of careful judicial logic, but rather an accretion of loose and careless analogies, all claiming to be based on each other and on this Court's having settled a matter that it never has decided at all. Such fragile but prolific pronouncements if not corrected could seem to point toward conceivable future holdings that almost any externally observed physical information about a person—a voiceprint, a fingerprint, a piece of hair, perhaps even a photograph or videotape²⁶—might be a search subject to full Fourth Amendment prerequisites.

²⁴ The district court in *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985), for another example, conceded that it was "unaware of any 'breathalyzer' cases on point" but nevertheless ruled that breath analyses were "searches" comparable to searches of "body cavities, bloodstreams or subcutaneous tissues . . ." *Id.* at 35.

²⁵ "[M]any of these decisions . . . merely parrot the conclusion that drug testing constitutes a search within the meaning of the fourth amendment." *Id.* at 1562 (dissenting opinion).

²⁶ *But cf. Cupp v. Murphy*, 412 U.S. 291, 296 (1973), permitting police without warrant "to preserve the highly evanescent evidence they found under his fingernails."

C. The Fourth Amendment Does Not Apply to Drug Tests Required by Privately Owned Railroad Companies Without Governmental Compulsion.

Subpart D of the regulations, 49 C.F.R. §§ 219.301-309, merely authorizes breath or urine tests in specified circumstances. It does not require them. Whether they are required depends on the decision of the railroad company. In fact, the very same panel of the Ninth Circuit in a case decided the day after the one under review here, challenging railroad drug testing under a collective bargaining agreement, acknowledged:

BN [the Burlington Northern Railroad Company] is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment. *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087, 1092 (9th Cir. 1988), *pet'n for cert. pending*, No. 87-1631.

The Court of Appeals also recognized that the Fourth Amendment does not limit any actions except those that can legitimately be attributed to the federal government. See, *e.g.*, *United States v. Jacobsen*, 466 U.S. 109 (1984). To surmount that hurdle, the Court of Appeals relied simply on a dictum in one of its own decisions from 1973,²⁷ and on references to statutes that authorize the Secretary of Transportation and the Federal Railroad Administrator to require, *e.g.*, accident reports and safety testing of railroad equipment. Pet. Cert. 10a-13a. Finally, it concluded that the railroads' requiring drug testing under Subpart D should be treated as if the federal government had required it, because

The general concern with drug and alcohol abuse and the national goal of eradicating that abuse is a matter of common knowledge.

Id. at 13a. Public concern, the Court of Appeals thus concluded, equates to governmental action. Under the Court of Appeals' loose and impatient reasoning, apparently a policy adopted by a private company that is con-

²⁷ *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (upholding airport searches of airline passengers).

sistent with a laudable and important objective that receives national attention, thereby becomes subject to the strictures of the Constitution as if the federal government itself had done it.²⁸

This Court has always rejected such an open-ended and unprincipled extension of "state action" concepts, and should do so again now. In fact, in recent decisions this Court has repeatedly rejected such notions and reiterated that even extensive government regulation, Congressional delineation of duties, even government-conferred monopoly status, do not turn an enterprise into the state for purposes of the Constitution. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S. Ct. 2971 (1987); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Nor do regulations that encourage private adoption of particular policies. *Blum v. Yaretsky*, 457 U.S. 991 (1982). Railroads are regulated, but so are other transportation companies, from airlines to buses and barges, and not excluding automobile manufacturers. That regulation does not turn their policies to assure worker competency and alertness into government action, even when the government authorizes (without requiring) such policies or encourages their adoption. "Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, *supra*, 107 S. Ct. at 2985. And the fact that "the activities performed by" a private entity "serve a national interest . . . 'does not make its acts [governmental] action.'" *Ibid.*, quoting in part *Rendell-Baker v. Kohn*, 457 U.S. 830, 742 (1982).

It is important to recognize that in this aspect of the case, the Ninth Circuit rendered a decision of enormous implications and utterly inconsistent with this Court's decisions on the constitutional meaning of "state action." The

²⁸ Other courts, not surprisingly, in the drug-testing context have held the contrary. *Greco v. Halliburton Co.*, 674 F. Supp. 1447, 1451 (D. Wyo. 1987).

railroad drug tests referred to in Subpart D are a matter of private decision as to what a railroad expects of its employees.²⁹ Those employees, without resigning, are able to challenge such requirements through their unions, under the terms of collective bargaining agreements, and in fact have had some success in doing so. See *Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988); *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1102 (9th Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet'n for cert. pending*, No. 87-1631; *Railway Labor Executives Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). The railroads are no different from other corporations in requiring such tests.³⁰ If the railroad unions are determined to pursue their unseemly effort to avoid drug testing of the operators of lethal locomotives, they at least should be relegated to the arena set up by Congress for resolution of collective bargaining disputes, and not try to elevate such disagreements to constitutional doctrine.³¹

²⁹ Respondents acknowledge that "[p]erhaps the most important factor that sets this case apart from all other cases is that the testing is *not* being performed by a public employer on public employees." Br. Opp. at 3 (emphasis in original). Their argument that compulsion exists applies of course to Subpart C, but not to Subpart D of the regulations.

³⁰ "Over 25% of the Fortune 500 companies now require drug tests of all successful job applicants." *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794, 799 (5th Cir. 1988) (footnote omitted).

³¹ This suit was brought by the unions against only the Secretary of Transportation and the Federal Railroad Administrator. No railroads were defendants. Yet, as previously noted, Subpart D of the regulations does not require drug testing, but simply authorizes railroads to conduct such programs if they choose. In other complaints respondents appear to have recognized this by suing the

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

Of Counsel:

WILLIAMS & CONNOLLY

Hill Building

Washington, D.C. 20006

WILLIAM C. SAMMONS

TYDINGS & ROSENBERG

201 North Charles Street

Baltimore, Maryland 21201

STANLEY J. GLOD

2323 Creek Drive

Alexandria, Virginia 22308

CHARLES I. APPLER

HAMEL & PARK

888 - 16th Street, N.W.

Washington, D.C. 20006

THOMAS L. BRIGHT

MARK, WEIGLE AND PERKINS

115 East King Street

Shippensburg, Pennsylvania 17257

* Counsel of Record

July 28, 1988

railroads themselves. See *Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1102 (9th Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet'n for cert. pending*, No. 87-1631. It has been the decision of some (not all) railroads—not an order of the federal government—that instituted those programs. Whatever the decision in this litigation as to the validity of Subpart D, those programs could continue. The railroads, necessary parties, are absent from the case.

ROBERT W. KATZ

GORDON, FEINBLATT, ROTHMAN,

HOFFBERGER & HOLLANDER

233 East Redwood Street

Baltimore, Maryland 21202

WILLIAM L. POPE

Post Office Box 944

Columbia, South Carolina 29202

BERTRAM D. FISHER

QUELLER, FISHER, BOWER

& WISOTSKY

110 Wall Street

New York, New York 10005

APPENDICES

APPENDIX A

Excerpt from transcript, *State v. Gates*, No. 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988.

. . . .

[45] On moving out onto Track 1 out of the yard, Cromwell sat in the firemen's seat while the Defendant sat at the controls. Both faced forward. The Defendant called out the first two to three signals within one and a half miles of the yard as Clear, which would be displayed as these signals on this chart. And, at that time, Cromwell acknowledged the Defendant calling out nine signals. Although Amtrak operating rules require that the engineer call each wayside signal and that the brakeman acknowledge, no more signals further down the track were called in the remaining nine miles. After the third signal, Cromwell pulled out a pin joint, which is a very thin, hand-rolled cigarette, containing marijuana that he had brought in his grip. Although he had originally intended to use it on the ride home, Cromwell decided to smoke it then with the Defendant because the two smoked while working on one previous occasion. Each man had about three hits of the joint. Then Cromwell smoked the remainder in a pipe. Although both the Defendant and Cromwell were faced forward and could clearly see the wayside signals, neither called them while smoking the joint.

. . . .

[56] The Victims Of The Collison. In addition to the death of the Amtrak Engineer, Jerome Evans, 15 passengers were killed as a direct result of the collison. Caroline and Uriel Bauer, ages 26 and 27, respectively, a recently married couple who resided in Manhattan, New York, both occupied the second [57] coach car, which is the second pasenger car in the consist. Caroline was pronounced dead at 7:12 p.m. on January 4th, 1987 as a result of cranial injuries and smoke inhalation. Her

husband, Uriel, was pronounced dead at 3:57 a.m. on January 5th, 1987 as a result of compression asphyxiation.

Esther Burkhart, age 71, who lived in Philadelphia, Pennsylvania, also occupied the second car. Mrs. Burkhart died as a result of multiple traumatic injuries primarily to her head and chest.

James Clay, age 33, from Vernon, Connecticut, sat in the second car. Mr. Clay was pronounced dead at 4:38 a.m. on January 5, 1987 as a result of compression asphyxia.

Thomas C. Colley, age 18, a freshman at the Rhode Island School of Design, sat in the second car on his return to school in Providence. Thomas was pronounced dead at 7:45 p.m. as a result of multiple blunt injuries, burns and smoke inhalation.

Laura Corti, age 22, occupied the second car on her return home to New York City. She was pronounced dead at the scene at 4:05 a.m. on January 5, 1987 from compression asphyxia.

Louise Edler, age 70, a resident of Wayne, Pennsylvania, occupied the third car in the consist. Mrs. Edler died of multiple injuries.

Ceres M. Horn, age 16, a resident of Baltimore County, Maryland was returning to school at Princeton [58] University, where she was a freshman honor student. Ceres, who sat in the second car, died as a result of compression asphyxia.

Christiane Johnson, age 20, a senior at Stanford University, rode in the second car traveling from her parents' home in Potomac, Maryland to New York to visit her sister. Christiane was pronounced dead at 4:48 a.m. on January 5, 1987 as a result of compression asphyxia.

Corrine and Kirsten Luce, sisters, age 13 and 16 respectively, occupied the second coach car on their return home to Westerly, Rhode Island. Kirsten was pronounced

dead at 5:25 a.m. on January 5, 1987 from cranio-cerebral trauma. Corrine was pronounced dead at 1 o'clock p.m. on January 5, 1987 due to multiple trauma to the cranio-cervical and thoracic region.

Adam Moore, age 7, and his grandmother, Pegg Moore, age 52, were seated in the second car on their trip home to Neptune, New Jersey. Adam was pronounced dead at 11:24 p.m. on January 4, 1987 as a result of compression asphyxia. Mrs. Moore was pronounced dead on January 5, 1987 at 1:14 a.m. due to multiple injuries.

Christina Piasecka, age 41, from Warsaw, Poland, occupied the third car. Ms. Pisasecka died of multiple injuries.

Connie Barry, age 31, occupied the second car on her return home to Ridgefield, Connecticut after visiting family in the Washington area. Mrs. Barry was trapped in the wreckage for 10 hours while rescue workers attempted to free her. She [59] was flown by helicopter to Shock Trauma, where she subsequently died at 6:20 a.m. on January 13, 1987 as a result of multiple injuries and hypothermia.

Approximately 174 passengers and crew of the Colonial sustained serious injuries and required treatment at local hospitals. Numerous fire fighters, police, paramedics, and National Guard responded to the wreck site to render emergency assistance.

* * * *

APPENDIX B

EXCERPT FROM PB88-916301

[SEAL]

NATIONAL TRANSPORTATION SAFETY BOARD

RAILROAD ACCIDENT REPORT

REAR-END COLLISION OF AMTRAK PASSENGER
TRAIN 94, THE COLONIAL AND CONSOLIDATED
RAIL CORPORATION FREIGHT TRAIN
ENS-121, ON THE NORTHEAST CORRIDOR
CHASE, MARYLAND
JANUARY 4, 1987

NTSB/RAR-88/01

* * * *

[6] *Damage*

The rear Conrail locomotive unit, both Amtrak locomotive units, and the head three passenger cars were destroyed. The middle Conrail locomotive unit was heavily damaged, and the rear nine cars of the passenger train sustained varying degrees of damage.

The rear Conrail unit was virtually disintegrated with parts scattered across the tracks and property east of the tracks. The largest piece of wreckage came to rest about 150 feet northeast of the collision point. The rear of the middle Conrail unit was crushed by the rear unit. Uncoupled from the lead unit, it was propelled forward on track 2 for about 700 feet. Only the rear truck of this unit derailed. The lead Conrail unit sustained relatively superficial damage, although driven forward about 900 feet, it was the only piece of equipment in the two trains that was not derailed.

The forward cab and superstructure of the lead Amtrak locomotive unit was crushed downward and inward to the underframe. Separated from the trucks, the remains of the car body came to rest west of the tracks about 400 feet north of the collision point. The trailing Amtrak unit remained in line with the track, although separated from its trucks, and came to rest leaning about 45° to the right at a point about 450 feet north of the collision point (see figure 3).

The head car of the passenger train, an unoccupied food service car, came to rest behind the trailing Amtrak locomotive. After passing over the food service car, the second car came to rest on its side on top of the rear of the trailing Amtrak locomotive unit. It was more or less perpendicular to the track, badly deformed and bent or crimped downward in the middle at an angle of about 30° (see figure 4). The third car stopped diagonally to the track, leaning to one side, on top of the crushed food service car. One end was crushed between the second

and fourth cars. The fourth car stopped diagonally to the track, upright and with the car body essentially intact. The 5th through 12th cars remained coupled and upright, although the 5th, 7th, 8th, and 9th cars had jackknifed and stopped diagonally to the track. The other derailed cars remained in line with the track (see figure 5).

[12] Derailed locomotive units and cars struck and brought down two steel support poles and the electrical catenary that had been suspended over the four tracks. As a result, the catenary wires over the four tracks were extensively damaged. In addition, the high-tension power transmission lines connecting the NEC substations with the power source were knocked down, which resulted in the immediate loss of propulsion power for all electrically powered trains between Washington, D.C., and a point 22 miles north of Gunpow. The downed wires also ignited diesel fuel from the destroyed Conrail locomotive unit producing dense, black smoke that entered the wrecked passenger cars. Small fires also broke out in residential property and wooded lots adjacent to the accident site.

The derailment destroyed switch 12 and destroyed or damaged about 2,800 linear feet of each of the four tracks at the accident location. About 5,700 linear feet of the tracks had to be replaced along with two steel support poles.

Rescue and wreckage clearing operations prevented the restoration of through-train operations for 2 days resulting in disruption of travel and a substantial loss of revenue to the carriers. In addition, Amtrak incurred substantial expense in moving stranded electrically powered trains and providing alternative transportation to passengers after the accident.

The damage was estimated as follows:

Conrail locomotives	\$ 1,325,000
Amtrak locomotives	7,400,000
Amtrak cars	6,423,000
Track	500,000
Overhead catenary system	285,000
Signals and communications	30,000
Cost of clearing wreckage	598,000
Total	<hr/> \$16,561,000

[55] Before December 1986, the Conrail engineer had been convicted of 12 traffic offenses, including 9 speeding violations that resulted in two suspensions of his driver's license between 1972 and 1985. Early on the morning of December 5, 1986, after leaving a tavern, the engineer was arrested for driving through a red traffic signal, driving through a stop sign, and driving while intoxicated (DWI) after failing police sobriety tests and submitting to a "breathalyzer" examination that revealed a 0.12 percent blood alcohol concentration (BAC).

Following the accident, the engineer voluntarily underwent a supervised chemical-dependency program involving his hospitalization for 7 weeks at a private Baltimore-area treatment facility. He subsequently pleaded guilty to and was convicted of DWI and the other charges; he was fined \$1,000 and ordered to undergo counseling.

[57] When questioned by Safety Board investigators, the engineer and brakeman of train ENS-121 could not recall any event or occurrence that may have distracted them as they approached Gunpow. However, the engineer did recall that he and the brakeman were conversing at the time. The brakeman said he was standing up and was preparing his lunch. As a result, he said he did not observe any of the wayside signals approaching Gunpow.

He further said that he observed an "approach medium" aspect on the cab signal at the location of signal 816-1. Thereafter, he said, "I didn't observe the cab signal at all. I wasn't even looking at the cab signal."

* * *

[62] *Medical and Pathological Information*

Pathological examinations indicated the 16 fatally injured persons died from the following causes:

- 6 Compression asphyxia ²⁵
- 6 Multiple trauma
- 1 Multiple trauma and hypothermia
- 1 Multiple trauma and smoke inhalation
- 1 Cranial trauma and smoke inhalation
- 1 Cranial trauma

[63] Many of the persons aboard train 94 who sustained survivable trauma were injured about the head, face, and mouth as a result of being thrown into seats or against other objects, and/or by being struck by luggage and other articles that fell from the racks above the seats. Of the 24 persons aboard train 94 who had moderate to serious injuries, 11 sustained bone fractures, 8 sustained severe contusions and/or lacerations, 3 sustained concussions, and 2 sustained cervical/spinal trauma.

The Conrail engineer received only minor injuries as a result of the accident. The Conrail brakeman had a fractured leg that he stated he sustained either when he alighted from the locomotive or when he ran from the track after the collision.

Toxicological Testing

At the time of this accident, FRA regulations (49 CFR Part 219, Subpart C) stipulated that all train crewmembers and other railroad employees subject to

²⁵ Compression asphyxia is asphyxiation (the lack of oxygen), often the result of trauma to the respiratory system.

the Federal Hours of Service Act involved in a major train accident resulting in one or more fatalities were subject to mandatory toxicological testing. Dispatchers and operators directly involved in the accident were expressly covered under this requirement. Blood and urine samples for testing were specifically required from each surviving employee; body fluid and/or tissue samples were required to be taken from fatally injured employees. The regulations further required that the railroad "make every reasonable effort to assure that samples are provided as soon as possible after the accident." The FRA sold kits to the railroads that included vials for holding samples, as well as labels and containers for shipping the samples to the Federal Aviation Administration's Civil Aeromedical Institute (CAMI) Forensic Toxicology Research Laboratory at Oklahoma City, Oklahoma.

Both Conrail and Amtrak had amended their rules to conform with the FRA testing regulation. Amtrak had included its new rule 100G-A1 in NEC timetable No. 4, in effect, at the time of the accident (see appendix D). The new rule stated that employees would be required to provide blood and urine samples after certain accidents and incidents as provided for under the Federal regulations. It also stated that employees refusing to submit to testing would be removed from service and would be subject to dismissal. According to Amtrak, corridor supervisors and managers were given a 2-day training course on the testing requirements and the techniques in taking and shipping samples to CAMI.

The surviving crewmembers of train 94, the Edgewood block station operator, and the E-section dispatcher testified that they understood Amtrak rule 100G-A1 and expected that they would be required to submit to toxicological tests after the accident.

The surviving crewmembers of train 94 were taken to hospitals for treatment of injuries. They were not accompanied by Amtrak supervisors and only one, the

extra assistant [64] conductor, provided a specimen for testing. According to the extra assistant conductor, he gave a urine sample about 6½ hours after the accident. No blood was drawn. The CAMI lab's screening of the urine was negative for alcohol and illicit drugs, but was positive for Acetaminophen (a pain relief medication) and phenylpropanolamine (an appetite suppressant or decongestant). The CAMI report described these as "... compounds probably from over-the-counter or prescription medication."

The Edgewood block station operator, accompanied by his supervisor, provided samples of his blood and urine about 4 hours 40 minutes after the accident. CAMI's screening of the samples were negative for alcohol and drugs. No other dispatchers or operators were either asked to submit or submitted samples for testing.

A Baltimore County Fire Department officer testified that he detected a strong odor of alcohol on the breath of the flagman of train 94 when he met him shortly after the accident. He also stated that he noticed nothing unusual about the way the flagman walked or talked at time. The fire department officer was a trained paramedic who had treated numerous accident victims later determined to have been under the influence of alcohol. The officer reported his observation to his superior, the deputy fire chief, the day after the accident. The flagman testified that he had not consumed any alcohol before, during, or after his tour of duty on January 4. Amtrak employees and supervisors who met the flagman after the accident stated that he appeared to be normal and that they did not detect the odor of alcohol.

A tissue sample from the Amtrak engineer was sent to CAMI for testing; the test was negative for alcohol. The toxicological report also stated that the specimen was unsuitable for further analysis.

The Amtrak general superintendent testified that he was aware that the FRA regulations and the Amtrak

rule regarding toxicological testing did not give him discretion in deciding which employees should be tested. The general superintendent also testified that he decided that only the Edgewood operator "might have been contributory" and ought to be tested.

The senior Amtrak officer at the accident site was the assistant vice president-transportation. When he arrived at the site, the flagman and two other assistant conductors had not provided toxicological samples. The assistant vice president also testified that he decided that the performance of the crew of train 94 and the dispatcher had no bearing on the accident. In addition, he said that he thought that he had discretion in the matter, and therefore, he did not require the crewmembers to be tested.

On January 6, 1987, Amtrak's general manager informed the Safety Board that the dispatcher and the surviving crewmembers of train 94 had not been required to submit to testing. Shortly afterward, the Amtrak assistant vice president-transportation [65] advised a member of the Safety Board that he had talked to the FRA associate administrator for safety. The assistant vice president related that he told the associate administrator, "We're running out of time. They're [surviving crewmembers] really not involved. We'd like some relief on that . . . referring to the toxicological tests. We do not want to put these people through more. It would not prove anything."

According to the assistant vice president, the associate administrator replied, "Yes, I understand and I agree." (See appendix J.) During the Safety Board's public hearing, the FRA associate administrator testified that he did not think Amtrak was asking for a waiver of non-compliance after failing to comply with the regulations. On January 7, 1987, following the disclosure that the surviving crewmembers of train 94 had not been tested in accordance with the rules, the FRA Office of Safety cited Amtrak for violations of the testing regulations.

At the Safety Board's insistence, Amtrak asked the dispatcher, conductor, flagman, and regular assistant conductor to provide blood and urine samples for testing on January 8. These samples were sent to the Center for Human Toxicology (CHT) in Utah. According to the reports furnished by the CHT, no drugs were detected in the samples provided by the assistant conductors and the dispatcher. The samples provided by the conductor were found to contain small quantities of a muscle relaxant and its metabolites.

Less than an hour after the accident, Conrail officials at the accident site had put the engineer of train ENS-121 in an ambulance to be taken unescorted to a hospital. About 4 p.m., they learned that he had left the ambulance and was still at the accident site. The Conrail Baltimore terminal superintendent then directed the Bay View trainmaster and a Conrail police captain to take the engineer to a hospital to provide samples for toxicological tests. After locating the engineer, they arrived at Franklin Square Hospital at 4:25 p.m., and the engineer was immediately taken for examination and x rays.

At 4:30 p.m., the hospital drew blood from the engineer for diagnostic purposes. This blood was screened for drug use; the hospital's records show that the test revealed less than 10 mg/dl blood alcohol and was negative for all other drugs including the cocaine metabolite (benzoylecgonine) and phencyclidine (PCP). At 5:30 p.m., the trainmaster located the doctor who was examining the engineer and requested that more of the engineer's blood be drawn for FRA testing. The blood sample was drawn about 6:00 p.m.; shortly after, the trainmaster witnessed the engineer provide a urine sample.

The trainmaster and an Amtrak official also witnessed the drawing of enough blood to fill two 10-ml "vacutainer" vials that were in the FRA test kit the trainmaster had brought with him. After sealing the vials,

the trainmaster labeled the seals [66] and had the engineer initial them as prescribed. He then iced and sealed the container and affixed the shipping labels, completing the procedure at about 6:10 p.m.

At 8 p.m., Conrail supervisors learned that the brakeman had been admitted to Johns Hopkins Hospital. The Bay View trainmaster arrived at that hospital about 9 p.m. with an FRA test kit. He was not able to obtain the urine sample until 9:50 p.m. or the blood sample until about 10:15 p.m. Again, he witnessed the taking of the samples; in this instance, enough blood was drawn to fill three 10-ml vials. He repeated the sealing, labeling, and packing procedures he had followed in the case of the engineer.

The specimen containers from the Conrail engineer and brakeman were shipped by air express to CAMI that night. CAMI subsequently reported finding the following marijuana concentrations in the specimens:

Individual	Nanograms per Milliliter		Hours after Accident
	delta-9-THC ¹	THC-COOH ²	
Engineer-serum	<5	42	5.0
Engineer-urine		67, 72	5.0
Brakeman-serum	<5	13	8.5
Brakeman-urine		87, 144 ³	8.5

¹ Delta-9-THC (delta-9-tetrahydrocannabinol) is believed to be the primary psychoactive ingredient of the marijuana (cannabis) plant.

² THC-COOH (sometimes rendered as 9-carboxy-THC) is a major nonpsychoactive metabolite of marijuana found in blood and urine.

³ CAMI reported two values on the urine marijuana carboxy (COOH) metabolite concentration using two different quantification techniques. The second values shown for THC-COOH were determined with the addition of a deuterated standard to the urine samples.

Only marijuana was found in the CAMI analysis; tests for the other drugs in the protocol were negative. CAMI reported less than 5 ng/ml of delta-9-THC in the serum of both men. According to the CAMI toxicologist, the level of delta-9-THC below 5 ng/ml was not quantified, although 5 ng/ml was apparently not the minimum level of sensitivity of the test.

After the Safety Board toxicologist reviewed the CAMI toxicology laboratory's analysis of the samples and after discussions among the Safety Board, the FRA, and CAMI, the Safety Board requested that any unused portions of the samples be shipped to the CHT for confirmation analysis. As a result, the serum and blood from the brakeman and urine from the engineer were shipped to the CHT. The CAMI toxicologist reported there [67] was insufficient serum from the engineer for a confirmation analysis. In addition, the Safety Board sent the vacutainer vial that contained the hospital's diagnostic bleed sample taken from the Conrail engineer to the CHT for testing. CHT reported that the three drops of blood in the vial were insufficient for marijuana analysis.

The CHT reported the following results of its testing of the specimens forwarded by CAMI:

Individual	Nanograms per Milliliter		Hours after Accident
	delta-9-THC	THC-COOH	
Engineer-serum	No sample	—	—
Engineer-urine		182	5.0
Brakeman-serum	Negative *	23	8.5
Brakeman-urine		80	8.5

In addition to cannabinoids, the CHT drug screen protocol included ethanol, opiates, PCP, amphetamines, barbiturates, cocaine, tricyclic antidepressant, antihista-

* The sensitivity limit of serum delta-9-THC by the technique used by CHT is about 0.5 ng/ml.

mines, carbamates sedative (meprobamate), and synthetic narcotics (meperidine or Demerol). The Conrail engineer's sample was found to be negative for all of these. The Conrail brakeman's urine tested positive for PCP; a gas chromatography/mass spectrometry (GC/MS) verification and quantification showed 45 ng/ml of PCP in his urine.

Inconsistencies in the CAMI test results and documentation prompted an investigation of the CAMI toxicology laboratory a month after the Chase, Maryland, accident. Subsequently, the inspector general of the DOT took over the investigation, the laboratory was closed, the biochemist in charge of the laboratory was relieved of his duties, and the FRA began using the CHT to analyze test samples.

On May 26, 1987, the CAMI biochemist pleaded guilty to Federal felony charges of providing false information to the FRA. According to the FRA, the CAMI laboratory had reportedly falsified blood serum test results in some previous train accident-related cases that occurred after the FRA test regulations were implemented early in 1986. The laboratory lacked the sophisticated GC/MS equipment needed to make the tests until late 1986, and no one in the laboratory had the expertise [68] to use the equipment when the Chase railroad accident tests were performed. The Safety Board further learned that the GC/MS equipment had not been calibrated for accuracy since December 5, 1986; moreover, it had been improperly calibrated at the time of the testing and had not been recalibrated since. A deuterated internal standard was not used in the serum marijuana analysis, nor were the serum THC data retained after the tests were made.

Following these developments, the CHT staff collected all FRA sample containers at the CAMI laboratory, including the original urine and blood sample containers for the Conrail engineer and brakeman. The engineer's

blood sample container held a small amount of blood that was subsequently diluted, analyzed, and found to contain 52 nanograms per milliliter of the carboxylic acid metabolite (THC-COOH) of marijuana. The diluted blood sample was reported to contain less than the test detection level of psychoactive delta-9-THC. However, due to the very limited sample, the sensitivity to detect THC was reduced. The urine sample of the engineer was found to contain 212 ng/ml of the carboxy metabolite of marijuana (see appendix K).

The specimens obtained for the Conrail brakeman were also reanalyzed. The results reported by CHT were 15 ng/ml of THC-COOH in the blood, 109 ng/ml of THC-COOH in the urine, and 64 ng/ml of PCP in the urine (see appendix K).

* * * *

[75] According to the report of the Baltimore County Fire Department, the county's emergency communications center received two emergency calls reporting a "big explosion on Eastern Avenue" at 1:29:47 p.m. and 1:29:49 p.m. On the basis of these calls, the Chase station units, three additional engine companies, a ladder truck, two heavy rescue trucks, a three-piece hazardous materials unit, a battalion chief, and a paramedic field supervisor were dispatched to the scene at 1:31:46 p.m. The Chase units arrived at the scene at 1:37 p.m., but while en route, the medic unit made a "heavy smoke showing" report at 1:36 p.m. and requested that four additional medic units be dispatched. At this time the paramedic field supervisor, while en route to the accident site, upgraded the request to eight medic units. This initiated the "major medical command mode" portion of the fire department's emergency plan, mobilizing the remaining medic companies in the county. Four additional fire companies, an air unit, and a mobile command post were dispatched at 1:42 to the Harewood Road area on the west side of the tracks. Also at 1:42 a battalion chief arrived and took overall command at the site. At 1:49,

the "major command mode" of the fire department's emergency plan was implemented mobilizing all remaining county volunteer units.

* * * *

[102] Despite these pharmacokinetic limitations, some conclusions can be made regarding the use of marijuana by the two Conrail crewmembers based on studies of the blood and urine concentrations of THC and its metabolites in volunteer subjects.³⁶

Almost 9 hours after the accident, the brakeman had a metabolite (THC-COOH) serum concentration of 23 ng/ml, a reported THC of 0, and a urine metabolite concentration of 80 ng/ml. Analysis of the second sample gave a urine concentration of 109 ng/ml. Assuming the brakeman did not use marijuana between the accident and the time of sampling, this information fits the profile of a frequent user. Assuming that the brakeman was a frequent user, then it can be concluded that he used marijuana within 2 days of blood sampling and that use could have occurred within 24 hours of the sampling time or within the 15-hour period before the accident.

The brakeman also had 45 ng/ml of PCP in his urine. In a human volunteer study, PCP was shown to have a half-life of about 17 hours, although in two individuals it was as long as 2 days, and in one subject, it was as short as 7 hours. Since blood concentrations are not available, the Safety Board could not determine when the brakeman ingested PCP or its effect on his performance at the time of the accident. If the marijuana and the PCP had been taken at the same time, the finding of PCP in the urine sample and the half-life of PCP

³⁶ Peat, Michael A., McGinnis, K. M., et al, "The Disposition of 9-Tetrahydrocannabinol, 11-Hydroxy-9-Tetrahydrocannabinol, and 11-Nor-9-Carboxylic-9-Tetrahydrocannabinol in Frequent and Infrequent Marijuana Users," submitted to Journal of Clinical Pharmacology and Experimental Therapeutics.

would support an assessment that marijuana was used within 24 hours of the time the samples were provided.

From the engineer's second set of urine and blood specimens, CHT obtained THC-COOH values of 212 ng/ml and 52 ng/ml, respectively. Urine concentrations of THC-COOH vary greatly and are not definitive in establishing the time of use. Comparison of the results of the blood analysis with those reported by Peat³⁷ suggests marijuana use within 24 hours before the samples were taken if the engineer is characterized as a heavy user. A blood value of 52 ng/ml clearly indicates that the engineer was a frequent user. A frequent user having a carboxy metabolite blood level of 52 ng/ml would be expected to have had a THC concentration in the range of 1.0 to 10 ng/ml. Since values above 3 ng/ml would probably have been detected by the CHT analysis, it is reasonable to assume that THC concentration in the engineer's blood would have been less than 3 ng/ml at the time the specimens were given. The THC concentration at the time of the accident would have been considerably greater.

[103] Mason and McBay have suggested that 5 ng/ml of THC in blood be used as a conservative limit for the presumption of a significant degree of a marijuana-induced effect.³⁸ According to Peat, data for both light and heavy users indicate blood THC concentrations are less than 5 ng/ml 1 hour after smoking one marijuana cigarette. Behavioral studies suggest, however, that pharmacological effect due to marijuana use persist longer than 1 hour.

A number of studies have determined the effects of marijuana use on a variety of performance tasks including driving an automobile and flying an aircraft simula-

³⁷ Ibid.

³⁸ Mason, A. P. and McBay, A. J., "Ethanol, Marijuana, and Other Drug Use in 600 Drivers Killed in Single-Vehicle Crashes in North Carolina, 1976-1981," *Journal of Forensic Sciences*, 1984.

tor. One of these studies shows that performance decrement occurred up to 7 hours after smoking a marijuana cigarette depending on the performance parameter measured.³⁹ The THC concentration correlated with the performance decrement. Another study using a flight simulator showed a decrement for up to 24 hours after use of a marijuana cigarette.⁴⁰ A third study looked at the combined effects of marijuana and alcohol and reported that the combined effect was more than the expected additive effects of the individual drugs.⁴¹

The above studies on marijuana use and performance appear to agree that there is a measurable decrement in performance for a period that is dependent on type and complexity of the performance function that is measured. The concentration profile of the engineer is well within the limits of the above studies since 5 hours after the accident he had a blood acid metabolite value of 52 ng/ml.

The 5-hour delay in obtaining the engineer's blood and urine samples negates the ability of the tests to determine the presence of a BAC level of about 0.06 percent or less at the time of the accident. It is known that the engineer had used alcohol on 2 successive nights before the day of the accident. The fact that he had pleaded guilty to a charge of driving while intoxicated during the early morning hours about 2 weeks before the accident and had voluntarily admitted himself into a hospital-administered chemical dependency program after the accident substantiates his frequent use of alcohol.

³⁹ Bennett, Gene, Licko, V., and Thompson, Travis, "Behavioral Pharmacokinetics of Marijuana," *Psychopharmacology*, Vol. 85, 1985.

⁴⁰ Yesavage, Jerome A., et al, "Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report," *American Journal of Psychiatry*, Vol. 142, 1985.

⁴¹ Sutton, Lawrence R., "The Effects of Alcohol, Marijuana and Their Combination on Driving Ability," *Journal of Studies on Alcohol*, Vol. 44, 1983.

[104] In his study, Sutton had found significant driving impairment when marijuana and alcohol equivalent to a 0.06 percent BAC were used in combination. If the Conrail engineer metabolized ethanol at the average rate of 0.015 percent per hour (conservative for a heavy drinker), then the ethanol in his blood would not have been detectable when he gave a blood sample 5 hours after the accident if he had a BAC of 0.06 percent at the time of the accident.

The literature cited previously supports the finding that the engineer's performance may have been impaired from the use of marijuana. Further, this could have been exacerbated if ethanol had also been present in the engineer's blood or if he had been suffering from alcohol abuse the night before.

The Safety Board believes that there were a significant number of manifestations of less than satisfactory performance by the Conrail crewmembers—the most evident of which was their failure to respond to restrictive signal aspects. The other manifestations of impaired performance include: their failures to resolve the console radio problem and to make the required predeparture brake tests; their failure to properly test the ACS system including the alerter whistle; the engineer's possible mistaking of the deadman cutout for the ACS cutout lock, and the engineer's delayed throttle responses. The Safety Board concludes that, based on this accumulation of manifestations of degraded performance and on the results of the toxicological testing, that the crewmembers of train ENS-121 were impaired at the time of the accident from the effects of marijuana possibly combined with the effects of the use of alcohol the night before the accident.

The Safety Board concludes that the ENS-121 crew's use of marijuana led to their inattention to their primary duties of operating the locomotive in a safe manner.

* * *

[123] *Supervision of Toxicological Testing.*—At the time of this accident, Federal regulations required all train crewmembers, dispatchers, operators, and other employees subject to the Federal Hours of Service Act to submit specimens for toxicological testing "as soon as possible" after a major accident that resulted in fatalities and in which they had direct involvement. The regulations required that the railroads make "every possible effort to assure that samples are provided" for testing. Amtrak and Conrail had included this testing requirement in their operating rules and had instructed supervisors and employees on its provisions and the proper use of the testing equipment. All Amtrak and Conrail crewmembers as well as the dispatcher and block station operators were required to be tested, and they stated that they expected to be tested.

Amtrak's safety supervisor and assistant vice president of transportation arrived at the site 30 minutes and 1 hour 25 minutes after the accident, respectively. Three Amtrak superintendents were there by 3:30 p.m., and the general superintendent arrived an hour later. Conrail's superintendent at Baltimore testified at the public hearing that he was on the scene 50 minutes after the accident. Shortly afterward, he was joined by a trainmaster and a road foreman of engines. Still later, a Conrail police captain and another trainmaster arrived. Thus, within 3 hours of the accident, at least six Amtrak and five Conrail supervisors were on the scene.

Amtrak officials testified at the public hearing that because the accident occurred on Amtrak and all involved were subject to Amtrak rules and supervision, it was Amtrak's responsibility to enforce the testing requirement. From the time the first supervisors arrived at the scene, each crewmember should have been monitored and taken promptly to provide specimens for testing.

Of the seven Amtrak employees who were subject to the testing requirements, only the Edgewood block sta-

tion operator was taken to a hospital by a supervisor for testing. Amtrak officials did not accompany the other employees to hospitals to ensure that specimens were furnished. One Amtrak assistant conductor did have a urine specimen taken that was forwarded to CAMI for testing, although the stipulated procedures were not followed.

Although a fire department official testified that he detected a strong odor of alcohol on the breath of the flagman of train 94 not long after the accident, he observed nothing else about the flagman that might have indicated he was intoxicated. Further, no other crewmembers corroborated the fire department official's testimony and some stated the flagman showed no signs of being under the influence of alcohol. In the event the conductor was incapacitated, the flagman would have been in charge of the crew of train 94. In that position, he would have had the responsibility for the train's passengers. Because of the importance of the position the flagman may have held and because he was a crewmember aboard a train involved in an accident, the Safety Board believes that testing of the flagman was particularly important. Because specimens for testing were not taken until several days after the accident, it is not possible to prove or disprove the testimony of the fire official concerning the flagman's condition.

Similarly, the Safety Board could not establish if the other crewmembers of train 94 and the dispatcher were free of alcohol and drugs because Amtrak's ranking officials at the accident site decided their performance had no bearing on the accident. The Amtrak assistant vice president of transportation circumvented his own company's rule and the Federal regulations when he decided not to have these persons submit to testing.

Following the accident, the Conrail engineer remained at the site and talked with many people including the Conrail terminal superintendent who, about an hour af-

ter the accident, ordered the engineer to be put in an ambulance to transport him to a hospital. However, since no supervisor escorted the engineer to the hospital, the engineer was able to leave the ambulance undetected. Valuable time was lost because the Conrail trainmaster at the accident site did not escort the engineer to the hospital for testing.

The Safety Board determined that neither the Conrail terminal superintendent nor the Amtrak assistant vice-president of transportation attempted to learn where the engineer had been taken and to instruct a supervisor to take samples. About 2½ hours after the accident, it was discovered that the engineer was still on the site and the Conrail trainmaster was told to accompany him to a hospital. Another 2 hours passed before a blood specimen was drawn for FRA testing, although the engineer had been at the hospital with the trainmaster for more than 1½ hours.

The brakeman did not provide specimens until 8 hours 45 minutes after the accident. His whereabouts were unknown to Amtrak and Conrail officials for more than 6 hours.

The Safety Board is deeply concerned about the failure of Amtrak and Conrail supervisors to comply with the intent of the FRA regulations for postaccident toxicological testing and about FRA's inability to achieve timely compliance with its regulations by these two railroads in this accident. The Safety Board is pleased that both railroads have now implemented all parts of the FRA's regulations, including reasonable cause testing. However, the Safety Board is not convinced that the compliance deficiencies that occurred in this accident will not re-occur.

* * * *

[144] *Probable Cause*

The National Transportation Safety Board determines that the probable cause of this accident was the failure,

as a result of impairment from marijuana, of the engineer of Conrail train ENS-121 to stop his train in compliance with home signal 1N before it fouled track 2 at Gunpow, and the failure of the Federal Railroad Administration (FRA) and Amtrak to require and Conrail to use automatic safety backup devices on all trains on the Northeast Corridor.

* * *

RECOMMENDATIONS

Based on its investigation of this accident, the National Transportation Safety Board on January 15, 1987, issued Safety Recommendations R-87-1 through -3 to the National Railroad Passenger Corporation (Amtrak):

* * *

[146]—to the Consolidated Rail Corporation (Conrail):

* * *

Improve the methods of identifying employees who abuse alcohol and/or drugs. (Class II, Priority Action) (R-88-13)

—to the Federal Railroad Administration:

Expand and intensify its oversight of Amtrak's operating practices, supervisory efficiency checks, and compliance with Federal safety regulations (including the requirements for postaccident toxicological testing), and periodically provide the Safety Board with its assessment of Amtrak's performance in these areas. (Class II, Priority Action) (R-88-14)

* * *

APPENDIX C

Excerpt from deposition of Ricky L. Gates, *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, U.S.D.C., D. Md., March 24, 1988.

[74] Q. When you left the Bayview Yard, what did you and Mr. Cromwell do?

A. We started some general conversation, I don't remember specifically what all the conversation was. It generally had to do with he was saying about a trip before then, we were complaining about the condition of the engines and that they should have been prepared for us before we signed up, and as we got north of River Interlocking, I believe, he had pulled out half of a pin joint of marijuana and asked if I wanted to smoke some.

Q. Up to that point had you been calling out [75] the signals?

A. Those two signals I did call.

Q. Which ones were they?

A. North Point and River.

Q. Was Mr. Cromwell also required to call out the signals?

A. Yes.

Q. Did he call out those first two signals?

A. I don't recall him calling them out, no.

Q. Do you recall him calling out any of the signals?

A. No.

Q. Did you call out any signals after River?

A. Not to my knowledge. Well, other than the stop signal, when I saw that.

Q. At the Gunpow Interlocking?

A. Yes.

Q. Okay. What did you do when Mr. Cromwell pulled out the marijuana cigarette at about River?

A. He asked me if I want to smoke it then, and I told him it was his, it was up to him, that I [76] would prefer if we were going to smoke anything, to wait until we got on the Port Road branch.

MR. SARSFIELD: Wait until what? I am sorry.

A. Until the Port Road branch.

Q. What was the reason you wanted to wait for the Port Road branch?

A. The scenery was better, the river on one side, the trees on the other, I felt it was more enjoyable there.

* * *

[77] A. The next thing I remember, we were still talking. I don't remember the exact nature of the conversation, we were still in the nature of complaining about the engines and him telling me something about the trip before then and his brother or something. And he put what was left of the joint into a pipe and he started lighting it up.

Q. At that point you had had three hits on the joint?

A. I believe so, yes.

Q. And then he put the remains of the joint into a pipe; is that correct?

A. Yes.

Q. What did he do with that?

A. He lit it up. He passed it to me at one point, but it had gone out, and I could—I don't recall whether I either tasted it before I tried to [78] light it, or I just smelled it, but I could smell the remnants of PCP in the pipe. And I handed it back to him and more or less I was agitated about it, and I mentioned it to him, and he told me it was his girlfriend's pipe and she had probably smoked it.

Q. Does PCP have an odor?

A. Yes, like parsley flakes. That was the only experience I had ever had with it years before, and that is what it smelled like, and so that's what I assume it was.

* * *

[82] A. Next thing I recall is through the conversation, I was running assuming we were going to go out or keep moving at Gunpow Interlocking, and I was trying to

make, save as much time as I could, I pulled the throttle out a little more is the last thing I remember.

* * *

[88] Q. Now, as you were approaching signal 816, what were you looking at?

A. I don't recall specifically, for the same reasons. I know I was talking to Butch, I glanced at him, because that's at the point where he was cutting off the tops of the water bottles, and I observed part of that. I probably glanced at the [89] speed indicator at some point, the scenery around me and at the signal. I was taking in quite a bit.

* * *

[104] Q. All right. What happened next?

A. Like I say, the general conversation, looking around at the scenery, then I suppose at approximately five to six pole lengths at the point [105] where I would have started slowing down to 40 before the interlocking I glanced up and I noticed the stop signal in front of me. I yelled to Butch more or less something obscene was the adjective I used that we got a stop signal, put it into emergency with the automatic brake, put the independent brake all the way on, put the throttle completely in the off position, took the reverser and threw it to the south position, pulled the throttle back out, which is called plugging the engines. We started sliding through. I grabbed the portable radio, just before we got under the signal. I started yelling three emergencies and started yelling our location and what was going on, that we were going through the stop signal, and I was more or less giving a play by play, that I wasn't sure we were going to get through the switch or not. Butch at that point was putting on his jacket, and he got off around the front of the engine and went down on the steps and as we slid slowly through the switch, he stepped off on to the ground and stood [106] at the switch as we continued sliding further.

* * *

[140] Q. What quantities were you normally drinking alcohol?

A. Anywheres from a minimum of a six-pack a day to a case and a half, two cases a day.

Q. A six-pack to a case or two cases a day; is that correct?

A. Sometimes, yes.

Q. And what was your average consumption? Was it closer to the one case?

[141] A. Average consumption was probably close to a case, yes.

MR. SANSFIELD: What was the answer to that? Average consumption was what?

A. Probably close to a case of beer a day.

Q. It was that pretty much every day?

A. Almost every day, yes.

Q. And by a case of beer, of course, we are referring to 24, 12-ounce cans of beer; is that correct?

A. Yes.

Q. For what period of time had you been consuming alcohol at that rate of almost a case a day, or over a case a day?

A. I would say for close to a year at that time.

Q. And during what times of day would you do your drinking?

A. Any time.

Q. What time of day would you start drinking?

A. Any time.

* * *

[142] Q. How frequently were you using marijuana at this point in time?

A. Maybe once or twice a week.

Q. How much would you use over the week, in terms of a quarter of an ounce?

[143] A. Usually two or three joints at that time. Prior to Christmas, I believe a couple of weeks before Christmastime. I had been on vacation for a week, and I had smoked about a quarter ounce of marijuana while I was on vacation.

Q. For what period of time had you been using marijuana at this rate?

A. Since about the age of 18.

* * *

BY MR. BUCKLEY:

Q. Would you admit that if you had not had the distractions and had been paying attention, you would have been able to see the home signal in time and to have stopped before going through the switch at Gunpow?

A. Probably would have, yes.

* * *

[215] A. I was starting to believe that I was psychologically addicted to marijuana, that—because I couldn't make myself quit, unless I replaced it with alcohol. And I was daydreaming quite a bit, when I was off to myself.

Q. Did you ever use hash?

A. Yes.

Q. How frequently did you use hash, hashish?

A. Not very frequently, you know. You use it just the same way as I would marijuana, but it wasn't as available.

Q. Did you use it in 1986?

A. I can't recall specifically; maybe.

Q. Did you ever use marijuana or any other illegal drugs with any of your Conrail co-workers?

A. Yes.

Q. The answer is yes?

A. Yes.

Q. On how many occasions?

A. I don't know.

[216] Q. Did that occur in 1986?

A. Yes.

Q. Was that a fairly frequent occurrence?

MR. SANSFIELD: Objection to leading.

Q. How frequent was the occurrence?

MS. SHEARER: If I might have a moment.

A. Would you repeat the question, please?

Q. How frequently did you use marijuana with your Conrail co-workers in 1986?

A. I can't recall any—I don't know how to answer it as far as frequency goes, but it was a number of times.

Q. More than ten?

A. Probably.

Q. More than 20?

A. Maybe.

* * *

[222] A. . . . Again, I might add I am subject to blackouts under the influence of drugs and alcohol.

Q. How common is the use of drugs or marijuana by Conrail employees?

MR. SARSFIELD: Objection.

A. I couldn't answer that.

Q. What is the reason you couldn't answer that?

A. Because I am not accountable for everyone else.

Q. Just talking in terms of your knowledge, [223] based on your knowledge, how frequent is the use of marijuana or other illegal drugs by Conrail employees?

MR. SARSFIELD: Objection, please.

A. Again, I can only answer for myself, and whoever was around me, if they did it, and they were around me when I was doing it, then we did it, or if they had it. I was around them, we did it. But I am not sure how to answer as far as frequency goes. Sometimes it was infrequent, sometimes more frequent than others.

Q. So it is something you did have occasion to observe from time to time; is that fair to say?

A. Yes.

Q. Okay. How long have you been subject to blackouts?

A. I am not sure about that either. I hadn't even been aware of it, until I started into recovery, that I was having blackouts.

* * *

APPENDIX D

Excerpt from testimony of Edward Walter Cromwell before the Grand Jury, in the Circuit Court for Baltimore County, Maryland, *In re Special Investigation*, May 1, 1987.

* * *

[103] Q: Were you doing anything at that time besides calling the signals?

A: That's when I reached in and got my joint out.

Q: The pin joint?

A: Yes.

Q: At what point? Was it after you called those two signals or before or during?

A: I believe it was right after or maybe even before [104] the North Point signal.

Q: Before the North Point signal?

A: I'm not exactly sure, but it was right outside of the yard.

Q: Outside of the yard?

A: As we were leaving Bay.

Q: As you were leaving Bay while you were on track number one?

A: Right, yes.

Q: And did you light the joint?

A: Yes, I did.

Q: What did you do with it?

A: We smoked it.

Q: When you say we, who do you mean?

A: Rick and I smoked.

Q: And how many hits off of it did you have?

A: I believe three.

Q: And how many did Rick have?

A: Probably about three also.

Q: Now, why did you pull that out? Why did you do that with Gates?

A: I have smoked with him on one other occasion.

Q: On a train?

A: Yes.

Q: When he was the engineer?

[105] A: Yes.

Q: What did you do with the remainder that was left of the joint after you each took some hits?

A: I smoked the roach in a bowl that I had.

Q: And by bowl you mean—

A: Pipe.

Q: And what did you do after that?

A: Put the bowl in my bag and started making lunch.

* * *

[115] A: I went back up to the north engine, the 5044, to see if Rick was okay, dead, or what was going on.

Q: And what did you find when you got up there?

A: He wasn't there and the portable radio wasn't there.

Q: So, what did you do?

A: I got my bowl out of my bag and got back down off the engine and I hid the bowl somewhere in somebody's yard. I'm not sure where. I started walking up to where the wreck was. I seen a rescue worker and they asked me if I was involved in the wreck. I said, Yes. He said, Walk out to the road and get in an ambulance.

* * *

[125] Q: And when you went to the NTSB (National Transportation Safety Board) hearing, did you testify that you had smoked with Gates on the run?

A: No, I told them that we didn't smoke at all that day.

Q: You denied it?

A: Yes.

Q: And to your knowledge did Gates deny that also?

A: Yes.

* * *

[130] Q: Had you ever—you had ridden before with Gates?

A: Yes. From what I know he's a good engineer, he knows all of the rules.

* * *

APPENDIX F

Excerpt from transcript of Hearing before the Committee on Commerce, Science and Transportation, United States Senate, February 25, 1988.

[89] THE CHAIRMAN [Senator Hollings]: . . . I take it on this one occasion that you pointed to in your own testimony, where you called in and said you were not ready to go to work, they said come on in anyway and that you looked okay. Can you elaborate on that?

MR. GATES: Well, it was a clerk that called me, that is required to order me for work. At that time he was going to show me refusing duty, which would have put me under disciplinary measures at work, and also it would cause him to some hardships.

And so I told him more or less that I would show up at work if he would call the trainmaster that was on duty and tell him what condition I told him I was in. I told him I was drunk.

I told him I would have a friend of mine drive me to work because I was not capable of driving myself, and we would put it in his lap and let him decide, with no intention myself of actually having to run a train that night.

When I did show up, I stopped briefly and got a coffee and walked into the back room where the trainmaster's office was. My crew was already there with him and was aware of what to expect from me when I walked in. I was spilling the [90] coffee all over the place because I was not walking straight.

And he told me I looked okay and that another member of my crew would keep me awake during the trip.

THE CHAIRMAN: What about the attitude of the employees? That indicates to me that when you do get in trouble and know you are not in a condition, that you do you mind stating so and you do have this responsibility foremost in mind.

If you had a vote amongst the employees you have been with on random testing, would they vote aye or no?

Would they vote and say no, we do not want to have such a thing, or would they vote and really consider it good for them as well as the traveling public?

What would be your opinion?

MR. GATES: Well, I know the union's position on it. I cannot answer for the other employees. But I know for myself, I would think, based on that, others would answer similarly.

As I said before, denial is the hallmark of the disease. That is the main thing. Nobody wants to get caught. You will deny and you will lie your way out of it if at all possible, and you will do anything you can to keep from being tested positive, or to even take the test in some instances.

* * *

[95] SENATOR DANFORTH: And have there been other cases, other than your own case, when the supervisor said, well, you are good enough to work? Do you know other cases when the supervisor had seen somebody on the job or seen somebody before he goes on the job and allowed him to proceed with his work?

MR. GATES: My case was the only one where I have experienced someone actually ordering me, knowing me and having me tell them I was intoxicated. I have been in other situations where the person I was working with, we both confronted a supervisor and we were—well, at least he was blatantly drunk, anyway, drunk enough to tell by looking and sniffing or whatever you want to do. And it was ignored.

[96] SENATOR DANFORTH: It was ignored by the supervisor?

MR. GATES: Yes, sir.

SENATOR DANFORTH: Do you think that during the 14 years you have been on the railroad that it has been a common everyday occurrence that people have operated trains while they have been impaired by alcohol or drug use?

MR. GATES: As I said before, I have not worked there in the past year, but I have no reason to believe

that anything has changed. It had slacked off for the past few years that I had worked there as far as visibility. That is why I cannot say whether some of the employees were continuing their practices or not.

But originally when I worked there, when I started working under Penn Central, it was a common everyday practice.

* * *

[99] SENATOR EXON: Either before this tragic accident or subsequent thereto, have you known of any one of your personal acquaintances that have turned themselves in for voluntary treatment, as the rules and regulations of the [100] Federal authorities allow?

MR. GATES: I have never known anybody to turn themselves in. I have known a couple of employees that were caught and more or less forced to go in for treatment, and they are doing very successfully now.

* * *

[143] SENATOR DANFORTH: Mr. Mann, you do not object to drug testing except random testing, is that right?

MR. MANN: That is correct. . . . The Brotherhood of Locomotive Engineers and the United Transportation Union have agreed to pre-employment, post-accident, periodic and reasonable cause.

* * *

[147] SENATOR DANFORTH: . . . Did the court case hold that this crazy Ninth Circuit case, did it not hold that testing after an accident was unconstitutional?

MR. MANN: It did.

SENATOR DANFORTH: Do you favor testing after accidents?

[148] MR. MANN: Only if there are protections built in will the unions favor testing.

SENATOR DANFORTH: You have taken the position that you favor testing after accidents.

MR. MANN: Correct, and there is a difference—

* * *

APPENDIX F

February 23, 1988

FEDERAL RAILROAD ADMINISTRATION
 ACCIDENT INVESTIGATION UPDATE
 CHESTER, PENNSYLVANIA
 JANUARY 29, 1988
 AMTRAK

BACKGROUND:

The accident occurred at 12:32 a.m. near Chester, Pennsylvania, when Amtrak's No. 66 (Night Owl) train—which should have been diverted to a clear track—was permitted to proceed onto a stretch of trackage occupied by a Maintenance of Way vehicle. The block tower operator who controlled the signal at the point where the Amtrak train should have been diverted fled the premises in mid-shift, immediately after the occurrence of the accident. The two locomotive units derailed and overturned. All 10 cars derailed and remained upright. The engineer and 18 passengers were injured.

CASUALTIES AND PROPERTY DAMAGE:

Nineteen people were injured. Property damage is estimated at \$297,150.

POST-ACCIDENT TESTING:

Train Crew and Others: Samples were obtained from the Amtrak engineer, conductor, four assistant conductors, the train dispatcher, a signal maintainer shortly after the accident, and from the block operator on the afternoon of February 1, 1988. One assistant conductor tested positive for the marijuana metabolite in the blood (27 ng) and urine (27 ng). Tests on all other crew members were negative.

Block Operator: The accident occurred at approximately 12:32 a.m. on January 29, 1988. The block oper-

ator left his post without authorization and accordingly was not available for post-accident toxicological testing required by FRA rules. On the afternoon of February 1, 1988, three and one-half days after the accident, the block operator met with representatives of the parties to the accident investigation.

At the conclusion of that interview, the block operator was asked if he would submit to testing under the Federal regulations, and he agreed to do so. He was then taken to a medical facility where specimens were collected shortly after 4:00 p.m. The samples were sent to the Center for Human Toxicology for testing under the FRA rule.

The block operator tested positive for the following compounds: for the marijuana metabolite in the blood (8 ng/ml) and urine (89 ng/ml); for the cocaine metabolite in the urine (S1 ng/ml); and for methamphetamine (74 ng/ml) and amphetamine (48 ng/ml) (possibly present as a metabolite of methamphetamine) in the urine. Other tests for drugs and alcohol were negative.

In view of the fact that the block operator had absented himself following the accident, FRA instructed the Center to test his specimens down to the sensitivity of the particular tests to determine the smallest detectable amount consistent with the reliability of the test procedures and equipment. Since drugs and their metabolites are eliminated from the body over a period of time that differs by type of drug, frequency of use, dosage, and other factors, testing in the range below the normal "administrative detection limit" (or usual cut-off levels) extends the period during which the drug is detectable.

Attached is an excerpt from FRA's Field Manual that indicates the "general parameters" for drug detection over time. This table assumes normal screening and confirmation cut-offs higher than those employed in the subject tests.

William E. Loftus
 Angela Sullivan
 Federal Railroad Administration
 (202) 366-0881
 February 23, 1988

RESULTS OF TOXICOLOGICAL ANALYSIS—
 BLOCK OPERATOR

Chester, Pa. ; Amtrak ; January 29, 1988
 (In Nanograms (ng) (per Mililiter)

Center for Human Toxicology
 (FRA)

Drug	Blood	Urine	(¹ /)	(² /)
Marijuana metabolite	8 ng.	89 ng	(20 ng)	(20 ng)
Cocaine metabolite	neg.	81 ng	(10 ng)	(150 ng)
Methamphetamine	neg.	74 ng	(20 ng)	(100 ng)
Amphetamine ³	neg.	48 ng	(20 ng)	(100 ng)

^{1, 2} Because the tests were not performed until the fourth day after the accident, FRA requested its laboratory to test the specimens down to the sensitivity of the assays (the lowest level at which the compound can be reliably identified). The first number in parenthesis is the sensitivity of the test; the second is the administrative reporting cut-off (on confirmation) for normal reporting purposes when specimens are collected within a reasonable time after the accident. The cocaine metabolite and methamphetamine/amphetamine results would have been reported as negative under normal reporting practices.

³ Possibly present as a metabolite of methamphetamine.

(13)
No. 87-1555

FILED

JUL 20 1988

JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICI CURIAE FOR
NATIONAL RAILROAD PASSENGER CORPORATION
AND ASSOCIATION OF AMERICAN RAILROADS
IN SUPPORT OF PETITIONER**

Of Counsel:

HAROLD R. HENDERSON
Vice President—Law
FREDERICK C. OHLY
Associate General Counsel
NATIONAL RAILROAD PASSENGER
CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001

J. THOMAS TIDD
Vice President and General Counsel
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001

ERWIN N. GRISWOLD
Counsel of Record
SARAH W. PAYNE
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3898
Counsel for the Amici

QUESTION PRESENTED

Whether an agency charged with maintaining railroad safety and investigating railroad accidents can, consistently with the Fourth Amendment, establish by regulation a program under which operating railroad employees are subject to warrantless alcohol and drug tests following their involvement in specified accidents or "human factor" rule violations?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF THE AMICI	2
STATEMENT	3
The Proceedings Below	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE FRA'S REGULATIONS SATISFY THE FOURTH AMENDMENT'S "REASONABLE- NESS" REQUIREMENT	7
A. The FRA's Regulations Rest Upon Compel- ling Interests of Public Safety Which Are Not Overcome By Countervailing Private Concerns	7
B. The FRA's Regulations Fall Within the "Ad- ministrative Search" Exception to the Fourth Amendment's Probable Cause and Warrant Requirements	13
C. Cause Requirements Incorporated Into the Regulations Satisfy the Fourth Amendment in the Circumstances of This Case	16
II. NO FOURTH AMENDMENT INTERESTS ARE IMPLICATED HERE BECAUSE THE FRA'S REGULATIONS DO NOT INVOLVE A "SEARCH OR SEIZURE"	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES:

Page

<i>Brotherhood of Locomotive Engineers v. Burlington Northern Railroad</i> , 838 F.2d 1087 (9th Cir. 1988), petition for cert. filed, No. 87-1631 (April 1, 1988)	3
<i>Colonnade Catering Corp. v. United States</i> , 397 U.S. 72 (1970)	13
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	10, 18
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981)	9-10, 13, 14
<i>Griffin v. Wisconsin</i> , 107 S. Ct. 3164 (1987)	18
<i>INS v. Delgado</i> , 466 U.S. 210 (1984)	20
<i>Michigan v. Chesternut</i> , 108 S. Ct. 1975 (1988)	20
<i>Michigan v. Clifford</i> , 464 U.S. 287 (1984)	17
<i>Michigan v. Tyler</i> , 436 U.S. 499 (1978)	17
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	7, 12
<i>New York v. Burger</i> , 107 S. Ct. 2636 (1987)	13, 15
<i>O'Connor v. Ortega</i> , 107 S. Ct. 1492 (1987)	10, 11-12
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	19
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	17, 20
<i>United States v. Biswell</i> , 406 U.S. 311 (1972)	13
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984)	11
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	10, 11, 20
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)	18-19, 20
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983)	20
<i>Wyman v. James</i> , 400 U.S. 309 (1971)	6, 20

STATUTES:

Hours of Service Act, 45 U.S.C. §§ 61 <i>et seq.</i>	4
Railway Labor Act, 45 U.S.C. §§ 151 <i>et seq.</i>	13
Federal Railroad Safety Act, 45 U.S.C. §§ 431 <i>et seq.</i>	13
Rail Safety Improvement Act of 1988, P.L. 100-342 (June 22, 1988)	13, 14

REGULATORY MATERIALS:

49 C.F.R. Part 217 (1987)	14
49 C.F.R. Part 218 (1987)	14

TABLE OF AUTHORITIES—Continued

Page

49 C.F.R. §§ 219.1 <i>et seq.</i> (1987)	<i>passim</i>
49 C.F.R. Part 220 (1987)	14
49 Fed. Reg. 24,252 (June 12, 1984)	17
50 Fed. Reg. 31,508 (August 2, 1985)	4, 8, 15, 17, 18

MISCELLANEOUS:

Angarola, <i>Protect Safety, Not Drug Abuse</i> , American Bar Association Journal 35 (August, 1986) ..	8
Associated Press	8
Comment, <i>Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool For Helping Resolve the Nation's Drug Problem if Competing Interests of the Employer and Employee are Equitably Balanced</i> , 25 Duq. L. Rev. 597 (1987)	7
Comment, "Drug Testing of Government Employees Should Not Be a Matter of Fourth Amendment Concern" Cries a Lone Voice in a Wilderness of Opposition, 1987 B.Y.U. L. Rev. 1239	7, 19
Comment, <i>Random Drug Testing of Government Employees: A Constitutional Procedure</i> , 54 U. Chi. L. Rev. 1335 (1987)	7
<i>Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Committee on Commerce, Science, and Transportation</i> , 100th Cong., 2d Sess. 50-1 (Statement of John H. Riley, FRA Administrator)	9
Los Angeles Times, June 24, 1988	9
Note, <i>Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs</i> , 39 Stan. L. Rev. 1453 (1987)	7
O'Connor, <i>The Military Says "No,"</i> Newsweek 26 (Nov. 10, 1986)	9
United Press International	8, 9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1555

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICI CURIAE FOR
NATIONAL RAILROAD PASSENGER CORPORATION
AND ASSOCIATION OF AMERICAN RAILROADS
IN SUPPORT OF PETITIONER**

This brief is filed on behalf of the National Railroad
Passenger Corporation and the Association of American
Railroads, as amici curiae, in support of the Petitioner.¹

¹ Consents from counsel for the parties have been filed with the
Clerk of this Court.

INTERESTS OF THE AMICI

The National Railroad Passenger Corporation ("Amtrak") manages the country's intercity rail passenger system. Amtrak operates trains in 43 states over a 24,000 mile network of track (most of which is owned and also used by freight railroads) with a workforce of some 22,000 employees. The Association of American Railroads ("AAR") is a trade association representing the nation's freight railroads, and has long studied and represented the industry on such matters as railroad operations, maintenance, and safety.

The Ninth Circuit's decision below—invalidating Federal Railroad Administration regulations which established a carefully focused program of alcohol and drug testing of railroad employees involved in certain accidents and human factor rule violations—is of grave concern to Amtrak and AAR. For more than two years, the present litigation has chilled implementation of the regulations, and by extension, slowed efforts by some railroads to promote additional measures to further curtail alcohol and drug use within the industry. Yet alcohol and drug-related accidents continue to occur, some involving passenger fatalities, many involving employee fatalities, and some imperiling entire communities by release of hazardous cargos.

As responsible employers, passenger carriers, and industry spokesmen, amici support all reasonable plans to prevent these tragedies. In adopting its regulations after a rulemaking proceeding of more than two years' duration, which was itself preceded by several years of analysis and discussion, the FRA determined that industry-wide toxicological testing is an essential step in dealing with the current substance abuse problem.

The FRA regulations provide a significant tool for identifying employees who use alcohol or drugs while performing functions associated with train operations.

By holding the regulations invalid in this case, the Ninth Circuit has seriously impaired efforts to prevent many avoidable fatalities, injuries, and much property damage in the railroad industry.² Amici thus have a direct and immediate interest in the outcome of this case.

STATEMENT

Acting pursuant to its statutory role of overseeing railroad safety, the Federal Railroad Administration ("FRA"), after thorough investigation, determined that alcohol and drug use by railroad personnel is a proven cause of a significant number of recent, avoidable railroad accidents and fatalities. To address this problem the FRA ultimately concluded that an alcohol and drug testing program *covering a limited number of railroad employees actually responsible for the movement of rail traffic* would be the most effective first step. Such a program would achieve the agency's desired objectives of insuring public safety by (1) increasing industry awareness of the correlation between accidents and alcohol or drug use, (2) deterring on-the-job substance abuse, (3) detecting and removing from service individuals whose use of alcohol or drugs presents an immediate safety risk, and (4) obtaining needed information on

² Railroad companies operating in the Ninth Circuit find themselves particularly disabled from addressing substance abuse by employees. Not only has the Court of Appeals there invalidated the FRA's regulations in the opinion presently at issue, it has also, in an opinion totally at odds with a prior Eighth Circuit decision, held that its Fourth Amendment analysis is determinative of the *contractual expectations* of parties to *pre-existing* collective bargaining agreements, thus effectively prohibiting railroads from instituting substance abuse programs independently. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed*, No. 87-1631 (April 1, 1988). That case involves the same critical public safety concerns raised here, but presents distinct legal issues regarding implementation of drug use testing by a private employer in the context of a collective bargaining relationship.

which to base further regulatory efforts.³ The regulations, applying almost exclusively to those railroad employees whom Congress determined in the Hours of Service Act to be performing service connected with the movement of trains, *see* 45 U.S.C. § 61(b)(2), 49 C.F.R. § 219.3(d), (e), were promulgated on August 2, 1985.

Part C of the regulations mandates prompt testing (by medical analysis of blood and urine samples) of Hours of Service employees involved in any of the following: (i) any train accident resulting in either a fatality, a release of a hazardous material (if accompanied by an evacuation or a reportable injury), or damage to railroad property of \$500,000 or more; (ii) a collision resulting in a reportable injury or damage to railroad property of \$50,000 or more; or (iii) a "train incident that involves a fatality to any on-duty railroad employee." 49 C.F.R. § 219.201(a).

Part D of the regulations permits, but does not require, prompt testing (by analysis of urine and breath samples) of Hours of Service employees who are (i) directly involved in reportable accidents or incidents and are reasonably suspected by supervisors to have contributed to the cause or severity of those accidents or incidents; or (ii) directly involved in specific human error⁴ operating rule violations. 49 C.F.R. § 219.301.⁵

³ *See, e.g.*, 50 Fed. Reg. 31,508, 31,540 (August 2, 1985).

⁴ The FRA notice announcing promulgation of the regulations describes in layman's terms the operating violations that are covered, and explains that each of these particular violations is "an objective event and a clear indication of a material deviation from safe practice suggesting the real possibility that the employee is not fit." 50 Fed. Reg. at 31,553.

⁵ Part D also permits testing of employees whom supervisors reasonably believe, on the basis of personal observation, to be under the influence of alcohol or drugs. 49 C.F.R. § 219.301(b)(1), (c)(2). The court below upheld these provisions, and they are not further discussed here.

Noting that it had "no jurisdiction to terminate employment relationships," 50 Fed. Reg. at 31,546, the FRA generally left the disciplinary consequences of positive test results to be determined by the employing railroad. It imposed as the only federal sanction a requirement that employees refusing to provide blood and urine samples under the mandatory (Part C) testing program be disqualified for nine months from Hours of Service work. 49 C.F.R. § 219.213. The agency expressly forbade physical coercion or "any other deprivation of liberty." 49 C.F.R. § 218.11(e). Hours of Service employees employed on and after February 10, 1986 were "deemed to have consented to" the testing program. 49 C.F.R. § 219.11(a).

The Railway Labor Executives' Association and certain labor organizations brought this action to enjoin the FRA's testing program, relying, in relevant part, on the Fourth Amendment.

The Proceedings Below

The District Court for the Northern District of California upheld the constitutionality of the challenged regulations, stating that "there are no factual issues." The court noted that the regulations serve compelling governmental purposes:

... the government certainly has a valid public and governmental interest in the promotion of safety and railway safety, safety for employees, and safety for the general public that is involved with the transportation. It's also obvious from the length of time and the detail in which the regulations have gone that the government has made a sincere attempt to gath[er] together information and do some balancing of interests on its own.

Appendix B to Petition, at 52a.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. The Secretary of Transportation sought review here, and certiorari was granted on June 6, 1988.

SUMMARY OF ARGUMENT

1. The FRA's regulatory alcohol and drug testing program is reasonable under any construction of the Fourth Amendment. The public interest in implementation of the regulations is compelling, in light of the risk to safety posed by train operators who abuse alcohol or drugs, the history of accidents related to substance abuse in the industry, and the need to prevent such tragedies in the future. Employee privacy interests are not unconstitutionally impaired, in view of the compelling governmental purpose underlying the regulations, extensive notice to affected employees, the lack of any intrusion upon "private" information other than illegal or wrongful drug or alcohol use, the loss of privacy which any employment relationship entails, and the lack of any physical compulsion. This Court's opinions regarding administrative searches, searches in the exigent circumstances posed by a safety investigation, and intrusions based upon non-individualized determinations of reasonable suspicion, fully support the conclusion that the FRA's regulations are consistent with the Fourth Amendment.

2. The Fourth Amendment proscribes arbitrary searches or seizures. Since the FRA regulations forbid forced administration of tests, no search or seizure is involved, despite the adverse employment-related consequences which may flow from a refusal to undergo testing. *Wyman v. James*, 400 U.S. 309 (1971).

ARGUMENT

I. THE FRA'S REGULATIONS SATISFY THE FOURTH AMENDMENT'S "REASONABLENESS" REQUIREMENT.

It is sometimes too widely assumed that the Fourth Amendment bars *all* searches and seizures. But, of course, its bar, by its terms, extends only to "unreasonable searches and seizures." Under the facts of this case, the provisions of the FRA regulations are not "unreasonable."

A. The FRA's Regulations Rest Upon Compelling Interests of Public Safety Which Are Not Overcome By Countervailing Private Concerns.

Any determination of Fourth Amendment reasonableness requires a balancing of the "'need to search against the invasion which the search entails.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). This case is viewed fairly only in the context of the great disparity that exists between the compelling public interests which the FRA's regulations serve, and the limited private intrusions which they cause.⁶

Quite simply, the FRA regulations serve to remove active substance abusers from responsibilities for operating trains, to deter other operators from engaging in drug or alcohol abuse, and to protect public safety by

⁶ For relevant discussions of the legal implications of drug testing at the workplace, see Comment, "Drug Testing of Government Employees Should Not Be a Matter of Fourth Amendment Concern" *Cries a Lone Voice in a Wilderness of Opposition*, 1987 B.Y.U. L. Rev. 1239; Note, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 Stan. L. Rev. 1453 (1987); Comment, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. Chi. L. Rev. 1335 (1987); Comment, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool For Helping Resolve the Nation's Drug Problem if Competing Interests of the Employer and Employee are Equitably Balanced*, 25 Duq. L. Rev. 597 (1987).

facilitating investigations of railroad accidents. As is true of a handful of other industries (e.g., nuclear power, air traffic control, trucking, aviation), the threat to public safety posed by Hours of Service employees whose judgment or senses are clouded by alcohol or drugs is plain. Substance abusers who operate trains endanger themselves; they also endanger the lives and property of fellow employees, rail passengers, railroad companies, and indeed—as a result of toxic cargos—entire communities.⁷ Other means of protecting the public are unworkable: railroad employees often must operate in far-flung locations and around the clock with little direct supervision, and, in any event, drug or alcohol ingestion sufficient to affect operational performance adversely frequently cannot be detected by even skilled observers.⁸ Toxicological testing, in contrast, does work.⁹

⁷ Derailments of trains in at least five states during 1987 caused evacuation of over 22,200 persons from their homes. See Associated Press, December 13, 1987, July 22, 1987, May 6, 1987; United Press International, February 2, 1987, January 6, 1987. A single derailment in Crofton, Kentucky recently required evacuation of 15,000 residents. See Associated Press, June 24, 1988.

⁸ See 50 Fed. Reg. 31,508, 31,526, 31,527, 31,536 (August 2, 1985).

⁹ In 1981 Georgia Power Company employees suffered 5.4 injuries per 200,000 man-hours at its Vogtle nuclear power plant construction site. In 1985 that number was fewer than .5 injuries per 200,000 man-hours.

In 1985 the Southern Pacific Railway reported a 71 percent drop in on-the-job accidents and injuries due to human-related error as compared to the previous year.

In 1982 the U.S. Navy identified 48 percent of the young enlisted men working for it as having used drugs for non-medical purposes. By last year that figure had dropped to 4 percent.

The common element here is the employer's use of drug testing as part of a comprehensive health and safety program aimed at identifying and treating drug abusers.

Angarola, *Protect Safety, Not Drug Abuse*, American Bar Association Journal 35 (August, 1986).

Following the Department of Defense's institution in 1982 of mandatory testing for every branch of the service, there was a 75

The public interest in toxicological testing of railroad employees entrusted with safety-sensitive responsibilities is heightened by the fact that, as the mounting number of drug and alcohol-related accidents confirms, a serious substance abuse problem exists within the industry. The most tragic accident in recent memory, which resulted in 16 deaths and scores of injuries, occurred near Chase, Maryland on January 4, 1987. The two crewmen responsible for that accident tested positive for marijuana, and one had traces of the hallucinogenic drug PCP in his urine. Unfortunately, the Chase, Maryland accident was no anomaly: since 1980, sixty-five percent of railroad accidents involving loss of life have been alcohol or drug related.¹⁰ In the last nineteen months alone there have been at least 51 major train accidents, involving 31 deaths, 375 injuries, and tens of millions of dollars in property damages, in which one or more railroad employees tested positive for drugs.¹¹ Over five percent of railroad employees undergoing post-accident testing test positive.¹²

Thus, the case for toxicological testing of railroad employees entrusted with operation of trains is a compelling one.¹³ Opposing it are the asserted privacy inter-

percent decrease in the number of personnel testing positive for marijuana, the most popular drug used. Use of other drugs declined as well. O'Connor, *The Military Says "No,"* Newsweek 26 (Nov. 20, 1986).

¹⁰ United Press International, July 6, 1988 (quoting Atlanta Journal interview with John H. Riley, FRA Administrator).

¹¹ See Los Angeles Times, June 24, 1988 (interview with John H. Riley, FRA Administrator); *Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Committee on Commerce, Science, and Transportation*, 100th Cong., 2d Sess. 50-1 (Statement of John H. Riley, FRA Administrator).

¹² *Developments in Drug and Alcohol Testing, 1988*, supra n.11, at 50-1 (Statement of John H. Riley, FRA Administrator).

¹³ Compare, e.g., *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (substantial federal interest in improving the health and safety

ests of Hours of Service employees subject to testing. But Fourth Amendment rights "are implicated only if the [challenged conduct] infringe[s] 'an expectation of privacy that society is prepared to consider reasonable.'" *O'Connor v. Ortega*, 107 S.Ct. 1492, 1497 (1987) (plurality opinion). When the expectations of privacy asserted here are considered in the context of the public interest in saving lives, property, and communities, it is evident that those expectations must be quite limited.

For one thing, beginning well before the effective date of the regulations at issue, affected employees have had presumed and actual notice that they would be subject to testing. Union representatives participated extensively in the FRA's notice and comment proceeding, meetings have been held to explain the regulations to affected employees, and Part C testing has been heavily featured in news stories in connection with rail disasters. Employers administering Part D testing are required to give employees detailed notice of the provisions of that Part. See 49 C.F.R. § 219.309(b). Furthermore, the regulations as promulgated gave affected employees advance notice that the testing program would be implemented, and that their consent would be a condition of employment. 49 C.F.R. §§ 219.11(a), 219.201(a). At this late date Hours of Service employees can hardly claim surprise when, following their involvement in significant train accidents or rule violations strongly suggestive of operator error, they are approached to undergo toxicological testing. Cf.

conditions in underground and surface mines supports warrantless administrative searches of mines); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (where a "reasonable suspicion" standard for border checkpoint stops would "largely eliminate any deterrent to the conduct of well-disguised smuggling operations," the public interest in conduct of such "seizures" is substantial for Fourth Amendment purposes); *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) ("We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles").

United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (controlling factor in upholding the constitutionality of warrantless, routine checkpoint stops in border areas is the limited nature of the subjective intrusion occasioned).

Second, the testing does not yield "private" information. The regulations do not authorize that samples be tested for any characteristic other than alcohol and drug abuse, nor do they authorize release to railroads by the independent medical facilities conducting the tests of medical information (other than the presence of alcohol or drugs or their metabolites) derived from the tests. The only personal information divulged to railroads is alcohol and drug use—information in which employees operating trains have no reasonable expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109, 122-4 (1984).¹⁴

Third, the tests here are administered in the context of the employment relationship, not in furtherance of a criminal investigation. FRA does not require that results be shared with law enforcement authorities; indeed, FRA states that "it is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation" except under a subpoena or order. 49 C.F.R. § 219.301. Privacy expectations of employees must be "assessed in the context of the employment relation"; and where those expectations are impacted by actual "practices and procedures, or by legitimate regulation," and are intruded upon for work-related, as opposed to criminal investigatory, purposes, they lose some or all of their constitutional significance. *O'Connor*

¹⁴ In this connection, note that most, if not all, railroads have for years enforced "Rule G," an industry safety rule which prohibits railroad employees from using alcohol or drugs while on duty, from possessing these substances while on company property, and from reporting for duty while under the influence of alcohol or drugs.

v. Ortega, 107 S.Ct. at 1501 (plurality opinion).¹⁵ Cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 348-50 (1985) (Powell, J., concurring) (students have a lesser expectation of privacy than the population at large, given the degree of familiarity between and among students and teachers, teachers' necessarily "unparalleled" authority over them, and the degree of exposure of the public school setting to supervision or oversight by the community, parents, and fellow students).

For these reasons, and because the regulations do not permit forced administration of tests, *see infra*, pp. 19-20, the employee privacy interests involved here are, at most, a slight basis on which to ground a Fourth Amendment challenge to the crucial public safety regulations at issue. Even if those privacy interests are constitutionally cognizable, Respondents' Fourth Amendment challenge fails

¹⁵ In *O'Connor*, the plurality reserved the issue of the "proper Fourth Amendment analysis for drug and alcohol testing of employees." The plurality's discussion of the "workplace context," moreover, concerned the expectations of privacy that pertain to "those areas and items that are related to work and within the employer's control." 107 S.Ct. at 1497. But cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 337-43 (1985) (applying a similar relationship-based analysis to Fourth Amendment issues raised by a "search [by school authorities] of a child's person or of a closed purse or other bag carried on her person") (emphasis added).

O'Connor is useful on the present facts, however, in its implicit recognition that the employment relation necessarily entails some intrusions on privacy and personal autonomy that would not be expected or tolerated by private citizens in their personal lives. The degree to which expectations of privacy are reduced may very well depend to some extent on the nature of the job, and there may be some intrusions—e.g., use of physical force—which would violate legitimate expectations of privacy in most or all circumstances. This case, however, does not involve physical compulsion, *see infra*, pp. 19-20, nor does it involve requirements or standards of conduct that are extraordinary when considered in the light of employee responsibilities.

under the opinions of this Court giving content to the Amendment's "reasonableness" standard.

B. The FRA's Regulations Fall Within the "Administrative Search" Exception to the Fourth Amendment's Probable Cause and Warrant Requirements.

The FRA's regulations fit easily within the guidance of this Court's "administrative search" cases. Such cases hold that warrantless searches, unsupported by traditional probable cause determinations, of premises of heavily regulated businesses are reasonable when performed without force and pursuant to appropriate standards. *See New York v. Burger*, 107 S.Ct. 2636 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). These cases, which emphasize the necessity for warrantless searches in order to meet the reasonable needs of public concern, turn on the fact that proprietors in such industries are aware of the extensive regulation to which they are subject and accordingly have no reasonable expectation of privacy.

Railroads were among the first modes of transportation to be extensively regulated. Although in recent years railroads have experienced some rate deregulation, government scrutiny remains close, particularly with respect to two areas that are vital in the present context: labor (*see, e.g.*, the Railway Labor Act, codified as amended at 45 U.S.C. §§ 151 *et seq.*) and safety (*see, e.g.*, the Federal Railroad Safety Act, codified as amended at 45 U.S.C. §§ 431 *et seq.*). Moreover, the Secretary of Transportation is now empowered to discipline railway workers for willful safety violations, and is charged with developing and implementing a licensing or certification program for locomotive engineers. *See Rail Safety Improvement Act of 1988*, P.L. 100-342, §§ 3-4, 13-17, 21-22 (June 22, 1988). Railroad employees are thus extensively regulated and subject to properly delineated administra-

tive searches, regardless of the presence or absence of warrants or probable cause.¹⁶

Administrative searches are valid, despite the absence of warrants or individualized suspicion, where (1) "there [is] a substantial government interest that informs the regulatory scheme pursuant to which the in-

¹⁶ The Court of Appeals held that while railroads are heavily regulated, railroad employees are not. Passage on June 22, 1988 by Congress of the Rail Safety Improvement Act of 1988, which supplies the precise regulatory provisions identified by the Court of Appeals as lacking, has since nullified the distinction. See *Donovan v. Dewey*, 452 U.S. 594, 606 (1981):

[I]t is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment. . . . Of course, the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make the imposition of a warrant requirement unnecessary. But if the length of regulation were the only criterion, absurd results would occur. Under appellees' view, new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation.

Drug abuse is a relatively new phenomenon, as is toxicological testing and the increase in the frequency with which hazardous cargos are carried.

Even if the regulatory changes made by the Rail Safety Improvement Act are disregarded, the Court of Appeals' reasoning was unsound. The penalties and burdens of the administrative schemes in the heavily regulated business cases ultimately fell on individuals, not on companies. Moreover, railroad employees in fact have long been subject to extensive regulation. See, e.g., 49 C.F.R. Parts 217 (requiring instruction of employees on operating rules and periodic testing of rule compliance); 218 (prescribing minimum safety requirements for railroad operating rules and practices—rules and practices which for the most part must be actually implemented entirely by employees); and 220 (establishing minimum requirements governing employees' use of radio communications in connection with railroad operations).

spection is made"; (2) warrantless inspections are necessary to the regulatory scheme; and (3) the inspection program, "in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant" (i.e., the regulations must advise that the search is being made pursuant to the law and in accordance with a properly defined scope, and must set appropriate limits on the time and place of the search). *New York v. Burger*, 107 S.Ct. at 2644.¹⁷

The governmental interest served by the FRA's regulations—public safety—could hardly be more compelling, as discussed above. In addition, testing must be done promptly after an accident or rule violation, if it is to serve its best purpose,¹⁸ and given the time constraints, confusion following accidents, and lack of familiarity of railroad personnel with the court systems in the many locations where accidents or violations may occur, a warrant requirement is neither realistic nor feasible, nor really useful in protecting Fourth Amendment values.

Perhaps most important, the FRA regulations do provide a "constitutionally adequate substitute for a warrant." The circumstances in which testing is required or authorized are carefully defined in almost totally objective terms: no employee will be tested under the regulations who has not either (1) been directly involved in one of the specified train accidents or safety rule viola-

¹⁷ The *Burger* opinion notes that "an expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home." 107 S.Ct. at 2674. The testing authorized here is administered to individuals in their status as "employees," not in their status as private citizens.

¹⁸ The FRA noted during the rulemaking proceeding the "difficulty associated with estimating previous alcohol and drug levels from specimens obtained some time later." 50 Fed. Reg. at 31,554. Part C tests are to be administered "as soon as possible after the accident or incident." 49 C.F.R. § 219.203(b)(1). Part D tests must be administered within 8 hours. 49 C.F.R. § 219.301(f).

tions; or (2) been directly involved in (and reasonably suspected by a supervisor to have contributed to the cause or severity of) a reportable accident or incident that results in injury, death, occupational illness, or damage to railroad property exceeding \$5,200. The regulations explicitly require that property damage estimates be made in good faith. 49 C.F.R. § 219.201(c). In addition, all blood and urine samples are to be collected at independent medical facilities by medical personnel or technicians. 49 C.F.R. §§ 219.203(c), 210.305(a). Railroads failing to comply with any part of the regulations are subject to civil penalties. 49 C.F.R. § 219.9. The testing scheme is thus certain and regular in its application; railroad officials have limited discretion in executing it, as employees well know.¹⁹

The administrative search cases thus justify the FRA's regulations.

C. Cause Requirements Incorporated Into the Regulations Satisfy the Fourth Amendment in the Circumstances of This Case.

While conceding that the Constitution does not require warrants in the context of this case, the Court of Appeals

¹⁹ The Court of Appeals concluded that the regulations are overbroad in scope because urine tests reveal drug usage, not impairment. In so holding, the court did not discuss the blood test alternative prescribed in the regulations. In any event, even assuming that testing cannot establish current impairment, the court did not address why persons who are sufficiently heedless of criminal laws and of their own wellbeing to take drugs should be presumed fit for duty. Surely it is reasonable for the FRA and railroads to conclude that such employees may have shown on occasion similar disregard for work-place rules and public safety. Nor did the court consider the fact that—as the empirical evidence regarding effects of drug testing programs shows, *supra*, n.9—involvement of a drug user in an accident or operator-error rule violation in itself is evidence bearing on the likelihood of impairment. Finally, the court did not explain why an employee's "right" to take illegal drugs in the privacy of his own home deserves precedence as a constitutional matter over the compelling interests of public safety which the FRA here seeks to advance.

concluded that the regulatory scheme was invalid because it did not premise test administration on "individualized suspicion." Whatever the merits of such analysis where a random or mass testing program is at issue, the court evidently failed to realize that the FRA regulations here contain implicit, *objective* cause requirements that satisfy Fourth Amendment concerns even apart from any applicability of the administrative search cases.

Specifically, the FRA deliberately crafted its regulations to require testing only following those accidents or rule violations which the FRA's experience in accident investigations showed to be either (1) difficult to investigate, (2) of significant public interest, or (3) historically attributable to operator error.²⁰ A legitimate intention to deter unsafe conduct and to perform safety investigations in the public interest thus is the sole motivating force underlying the regulatory classifications. In the context of the FRA's findings that an alcohol and drug problem exists in the railroad industry and that this problem has caused a significant number of serious accidents,²¹ the fact that body fluids must be collected promptly if they are to be of value to investigators creates an exigency which fully justifies the intrusions these regulations entail. *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978). No "unreasonable" search or seizure is required.

In addition, the intrusions here result not from mere "inarticulate hunches," *see Terry v. Ohio*, 392 U.S. 1, 22 (1968), but instead from an "articulable basis amounting to a reasonable suspicion" that drug or alcohol abuse is involved. To repeat, drugs and alcohol have been shown to contribute to a significant number of serious rail accidents. Given this fact, involvement by operating personnel in such accidents (or in safety violations which

²⁰ *See, e.g.*, 50 Fed. Reg. at 31,542.

²¹ *See, e.g.*, 49 Fed. Reg. 24,252, 24,254, 24,265 (June 12, 1984).

are likely to cause such accidents) in itself supports a reasonable suspicion of substance abuse. *Delaware v. Prouse*, 440 U.S. 648, 659 (1979). Adding to the weight of this suspicion, the FRA has excluded from its description of events triggering the testing requirements those accidents not normally attributable to operator error.²² Thus, the FRA regulations express, in objective terms, sufficient grounds in the circumstances of this case for a constitutionally-adequate suspicion that the employees tested will be found to have improperly used alcohol or drugs.

At bottom, the Court of Appeals' rejection of these regulations is grounded not on a finding that they operate arbitrarily, but instead on the fact that they are objective, rather than subjective. This reasoning is ironic, when viewed in terms of Fourth Amendment values; and is, in any event, not supported by this Court's decisions. See, e.g., *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987) ("The search of Griffin's residence was 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers," even though the search was based on facts establishing only the "likelihood" that the suspected inculpatory items would be found); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (requiring either an "appropriate factual basis for suspicion directed at a particular automobile [or] some other substantial and objective standard or rule to govern the exercise of discretion"); *United States v. Mendenhall*, 446 U.S. 544 (1980) (Powell, J. concurring) (drug courier profile, applied by experienced officer, was a "well-planned, and effective Federal law enforcement program" satisfying

²² Note, for example, that the FRA expressly exempted from the testing provisions employees involved in rail/highway grade crossing collisions, 49 C.F.R. § 219.201(b), observing that in most cases, such collisions are not caused by errors on the part of railroad personnel. See 50 Fed. Reg. at 31,543.

"reasonable and articulable suspicion of criminal activity" standard). The FRA's regulations satisfy the Fourth Amendment's test of reasonableness.

II. NO FOURTH AMENDMENT INTERESTS ARE IMPLICATED HERE BECAUSE THE FRA'S REGULATIONS DO NOT INVOLVE A "SEARCH OR SEIZURE."

Relying on *Schmerber v. California*, 384 U.S. 757 (1966), the Court of Appeals concluded that tests conducted pursuant to the FRA regulations effect a "search and seizure." In so holding, the court ignored a crucial distinction between this case and *Schmerber*. *Schmerber* involved administration of a blood test by force or threat of force; the FRA regulations, in contrast, expressly prohibit forced administration of tests.

Indeed, the only consequence of a refusal to undergo testing is an alteration of employment status.²³ The regulations require that an employee refusing to undergo Part C testing be disqualified for nine months from operating trains. Implicitly, the regulations also permit the employing railroad to make whatever other adjustments to employment status that the railroad may deem necessary and not inconsistent with legal obligations. The latter

²³ As noted *supra*, p. 11, the tests mandated here reveal drug or alcohol use—information devoid of constitutional protection. Respondents' claim that a search and seizure is involved therefore must rest on the administration of the tests, rather than on the information the tests yield. Cf. Comment, "Drug Testing of Government Employees Should Not Be a Matter of Fourth Amendment Concern" *Cries a Lone Voice in a Wilderness of Opposition*, 1987 B.Y.U. L. Rev. 1239, 1245-8 (noting that the Fourth Amendment analysis in *Schmerber* did not rest upon the physiological secrets which a blood test theoretically might reveal, and contending that the Bank Secrecy Act of 1970, held in *California Bankers Association v. Schultz*, 410 U.S. 19 (1973), not to implicate the Fourth Amendment, "certainly has the potential for revealing significantly more about an individual's private life than urine testing").

decisions will be made in the context of the procedures and requirements which Congress and the courts have deemed appropriate to protect the employment interests of railroad labor. While uncomfortable to the employee, these consequences in no way impinge upon his physical liberty.

This Court rightly refuses to engage in hypertechnical constructions of the words "search and seizure." *Terry v. Ohio*, 392 U.S. 1, 17-8 n.15 (1968). This does not mean, however, that those terms are devoid of content. The Court construes the terms according to their ordinary meaning, which contains, at a minimum, a requirement of physical compulsion. *See, e.g., Terry v. Ohio*, 392 U.S. at 19 n. 16 ("Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred"). *Accord, Michigan v. Chesternut*, 108 S.Ct. 1733 (1988); *INS v. Delgado*, 466 U.S. 210 (1984); *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) ("neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search"); *United States v. Villamonte-Marquez*, 462 U.S. 579, 592 (1983) (brief encounter involving boarding of a vessel, visiting of public areas of the vessel and inspection of documents is not a search of the vessel or of its occupants). Here, where both force and the threat (objective or subjective) of force are lacking, no Fourth Amendment search or seizure occurs. *Compare Wyman v. James*, 400 U.S. 309, 317 (1971) (where visitation by social worker "in itself is not forced or compelled, [and] the beneficiary's denial of permission is not a criminal act," the visit is not a Fourth Amendment search, even though it may have "both rehabilitative and investigative" purposes, and even though benefits cease if the visit is refused).

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in Petitioner's brief, the FRA's regulations should be held to be fully consistent with the Fourth Amendment, and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel:

HAROLD R. HENDERSON
Vice President—Law
FREDERICK C. OHLY
Associate General Counsel
NATIONAL RAILROAD PASSENGER
CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001

J. THOMAS TIDD
Vice President and General Counsel
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001

July, 1988

ERWIN N. GRISWOLD
Counsel of Record
SARAH W. PAYNE
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3898
Counsel for the Amici

14



No. 87-1555

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, et al.,

Petitioners,

vs.

RAILWAY LABOR EXECUTIVES
ASSOCIATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA EMPLOYMENT
LAW COUNCIL AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS

VICTOR SCHACHTER *
LAWRENCE HECIMOVICH
SCHACHTER, KRISTOFF, ROSS, SPRAGUE & CURIALE
101 California Street, Suite 2900
San Francisco, California 94111
(415) 391-3333

Attorneys for Amicus Curiae
California Employment Law Council

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	2
FACTS AND SUMMARY OF ARGUMENT	4
A. Facts	4
B. Summary of Argument	5
ARGUMENT	
THE FEDERAL RAILWAY ADMINISTRATION'S DRUG TESTING PROGRAM SATISFIES THE FOURTH AMENDMENT'S REASONABLENESS TEST	8
I. PARTICULARIZED SUSPICION IS NOT CONSTITUTIONALLY REQUIRED	8
II THE FRA'S POST-ACCIDENT DRUG TESTING PROGRAM IS CONSTITUTIONALLY REASONABLE	13
A. The FRA Program Was Justified At Its Inception	14
1. The Government's Interest In Railway Safety Is Compelling	14
2. Railway Employees' Expectations Of Privacy Are Limited By The Employment Relationship	16

	Page
3. Other Circuits Have Found Such Testing To Be Reasonable In Light Of Compelling Safety Concerns	18
B. The FRA Program Is Reasonably Related In Scope To The Railway Industry's Safety Concerns	22
1. Post-Accident Testing Is The Least Intrusive Means Of Identifying Dangerous Substance Abuse Among Railway Employees	22
2. FRA Testing Safeguards Assure Minimal Intrusion Upon Employees' Privacy Expectations	25
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
Cases	
Bell v. Wolfish 441 U.S. 520 (1979)	8
Blum v. Yaretsky 457 U.S. 991 (1982)	2
Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co. 838 F.2d 1087 (9th Cir. 1988) Docket No. 87-1631, April 1, 1988	3
Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co. 802 F.2d 1016 (8th Cir. 1986)	23
Connick v. Meyers 461 U.S. 138 (1983)	16
Delaware v. Prouse 440 U.S. 648 (1979)	25
Division 241 Amalgamated Transit Union v. Suscy 538 F.2d 1264 (7th Cir.), <i>cert. denied</i> , 429 U.S. 1029 (1976)	5, 6, 9, 19, 21
Ingersoll v. Palmer 241 Cal. Rptr. 42 (1987)	12
Jones v. McKenzie 833 F.2d 335 (D.C. Cir. 1987)	5, 9, 19, 21

	Page
Lovvorn v. City of Chattanooga 846 F.2d 1539 (6th Cir. 1988)	16, 17
McDonell v. Hunter 809 F.2d 1302 (8th Cir. 1987)	5, 6, 9, 20, 21
National Treasury Employees Union v. von Raab 816 F.2d 170 (5th Cir. 1987), <i>cert. granted</i> , No. 86-1879 (Feb. 29, 1988)	3, 5, 9, 26
New Jersey v. T.L.O. 469 U.S. 325 (1985)	8, 16
O'Connor v. Ortega — U.S. —, 94 L.Ed.2d 714 (1987)	10, 12, 13, 17
Penny v. Kennedy 846 F.2d 1563 (6th Cir. 1988)	16
Railway Labor Executives' Association v. Burnley 839 F.2d 575 (9th Cir. 1988)	<i>passim</i>
Schowengerdt v. General Dynamics Corp. 823 F.2d 1328 (9th Cir. 1987)	18
Shoemaker v. Handel 795 F.2d 1136 (3rd Cir.), <i>cert. denied</i> , 107 S.Ct. 577 (1986)	5, 6, 9, 18
Snepp v. United States 444 U.S. 507 (1980)	16
Terry v. Ohio 392 U.S. 1 (1968)	8

	Page
United States v. Jacobsen 466 U.S. 109 (1984)	2
United States v. Martinez-Fuerte 428 U.S. 543 (1976)	9-12
United States v. Villamonte-Marquez 462 U.S. 579 (1983)	9
Wyman v. James 400 U.S. 309 (1971)	9

Regulations

Federal Railroad Administration Regulations	
49 CFR 219.1(a)	2
49 C.F.R. 219.201-213, Subpart C	4
49 C.F.R. 219.203(a)(3)(i)	25
49 C.F.R. 219.301	11
49 C.F.R. 219.307(b)	26
49 Fed. Reg. 24252	10, 11
49 Fed. Reg. 24294	15
50 Fed. Reg. 31,508, 31,536	23
50 Fed. Reg. 31,526, 31,527	23
53 Fed. Reg. 16641	15

Publications

M. de Bernardo, Drug Abuse in the Workplace: An Employer's Guide (1987)	14
NIDA Notes, U.S. Department of Health & Human Services, Dec. 1986	14

No. 87-1555

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, et al.,
Petitioners,

vs.

RAILWAY LABOR EXECUTIVES'
ASSOCIATION, et al.,
Respondents.

BRIEF OF THE CALIFORNIA EMPLOYMENT
LAW COUNCIL AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS

The California Employment Law Council ("CELC" or "*amicus*") submits this brief as *amicus curiae* to urge the Court to reverse the Ninth Circuit's holding that regulations of the Federal Railroad Administration mandating blood and urine testing of railroad employees involved in specified train accidents and fatal incidents, and authorizing breath and urine tests after specific accidents, incidents and rule infractions, violate the Fourth Amendment since they do not require "individualized" suspicion of drug or alcohol impairment prior to testing.¹

¹ Petitioners and Respondents have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The CELC is a voluntary, nonprofit organization composed of more than 60 companies employing over 400,000 persons. Its members represent a broad segment of the employer community in California. Amicus was formed to promote the common interests of employers and the public in sound procedures and laws pertaining to employment practices.

While governmental entities such as petitioner are not members of CELC, amicus represents many private companies within industries subject to extensive governmental regulation designed to promote workplace safety. In addition, virtually all of CELC's member companies rely upon heavily regulated industries to provide safe and reliable services. Many of these companies handle and require the transport of commercial products which could endanger the public in the event of a serious accident. Moreover, numerous CELC members have embarked upon comprehensive safety programs to ensure the well-being of their employees and the public. These programs entail the prevention of substance abuse in the workplace.

In promulgating the regulations in this case, the Federal Railroad Administration ("FRA") sought to achieve safety objectives which are of great concern to CELC and its members, to wit, "to prevent accidents and casualties . . . that result from impairment of employees by alcohol or drugs." 49 CFR 219.1(a). Many CELC members, in order to assure a safe working environment, have developed substance abuse policies which, like the regulations in issue, require urine testing of employees after certain accidents, incidents and rule violations, without a showing of "individualized" suspicion. Notwithstanding that CELC members are in the private sector, and therefore are generally not subject to Fourth Amendment prohibitions,² the issues in this case will undoubtedly impact

² *United States v. Jacobsen*, 466 U.S. 109 (1984). While the Fourth Amendment applies primarily to public sector employers, courts have
(continued)

all employers.³ Indeed, the Ninth Circuit has already applied *Burnley* to a private sector, post-accident testing program, finding its "individualized suspicion" requirement "readily applicable". *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087, 1093 (9th Cir. 1988).⁴

Accordingly, *amicus* has a strong interest in the outcome of this and other cases involving the contravention of drug usage in the workplace.⁵ CELC believes that the Ninth Circuit's decision unjustifiably frustrates the proper regulation of employee and public safety and erroneously restricts legitimate substance abuse testing.

(ftn. continued)
applied its protections in the private sector where significant government involvement is present. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982).

³ In a real sense, the true parties in this case are *private* railroads and their employees, to whom the regulations at issue apply. Many CELC members are subject to similar regulatory supervision by various governmental agencies.

⁴ A petition for review of the Ninth Circuit's decision in *Burlington Northern* was filed with the Court on April 1, 1988 (Docket no. 87-1631)

⁵ CELC has filed an *amicus* brief in *National Treasury Employees Union v. von Raab*, No. 86-1879, which has been consolidated for argument with the instant case. That brief sets out more fully CELC's concerns with regard to the societal problem of drug use among employees and the resulting endangerment of personal and public safety.

FACTS AND SUMMARY OF ARGUMENT

A. Facts

After several years of rulemaking pursuant to its authority under the Federal Railroad Safety Act of 1970, the FRA promulgated regulations designed to prevent accidents, injuries and property losses due to alcohol and drug impairment of railway employees. The regulations were implemented following consideration of extensive safety data and the viewpoints of industry, labor and the general public.

It is important to emphasize that the regulations in question require railroads to conduct blood and urine testing only in *limited* situations where railroad employees are directly involved in a major train accident.⁶ The regulations authorize railroads to conduct breath and urine tests where other serious accidents, incidents or rule violations have occurred or where a supervisor forms a "reasonable suspicion" that an employee is under the influence of or impaired by alcohol or drugs, based upon specific observations concerning the appearance or behavior of the employee. In addition, the regulations provide procedural safeguards for employees, including the right to disciplinary hearings and the right to insist upon blood testing for the most accurate determination of impairment.

When respondents challenged the drug testing of railway employees on constitutional and statutory grounds, the district court granted summary judgment for petitioners, finding the governmental interest in railway safety for employees and the general public paramount. The lower court noted that "objective" triggering events justify testing, and that the regulations made a "genuine attempt" to reasonably limit the scope of the

⁶ Subpart C (49 C.F.R. 219.201-213) defines a "major" accident as one which involves a fatality, the extensive release of hazardous material, or a reportable injury or damage of \$50,000 or more. (49 C.F.R. 219.201, 203).

testing requirements. Finding the railroad industry to be "pervasively regulated," the court applied the standard of constitutional scrutiny for administrative searches, and found the tests reasonable in light of the government's safety concerns.

The Ninth Circuit reversed, holding that "individualized suspicion" was required before drug testing could be "justified at its inception" so as to meet Fourth Amendment requirements. The court refused to apply the administrative search standard and ruled that the tests were not "reasonably related" to improving rail safety, as they could not detect current drug intoxication or degree of impairment. The Ninth Circuit concluded that the Fourth Amendment required "observable symptoms of impairment with a positive [test] result," and not just involvement in an accident, to provide a "sound basis" for drug testing and potential disciplinary action.

B. Summary of Argument

In ruling that individualized suspicion is necessary, the Ninth Circuit rendered a decision in conflict with the reasoning of every other court of appeals which has reviewed testing in response to workplace substance abuse problems. *National Treasury Union v. von Raab*, 816 F.2d 170, (5th Cir. 1987), *cert. granted*, No. 86-1879 (Feb. 29, 1988) (customs service agents); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (correctional employees); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (school bus employees); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986) (race jockeys); and *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (bus operators).⁷ The Ninth Circuit's contrary position

⁷ Drug testing in the absence of individualized suspicion was upheld without evidence of workplace substance abuse problems in *von Raab* and *McDonell* in light of the serious and immediate dangers employee drug use would pose to institutional integrity and security.

rests upon its determination that the other circuits did not consider "precisely the factors we consider relevant" (*von Raab*); incorrectly reasoned that "urine testing is a lesser intrusion than body searches" (*McDonell*); adopted a "rationale [not] applicable to the employees in our case" (*Shoemaker*); and reached a decision "without very thorough analysis" (*Suscy*).

The Ninth Circuit's decision that the FRA regulations violate the Fourth Amendment is seriously flawed in its constitutional analysis. The circuit court properly stated that this Court does not require individualized suspicion as an irreducible minimum under the Fourth Amendment, yet it adopted that requirement despite the compelling facts of this case. Having found individualized suspicion to be constitutionally required, the court did not balance the competing interests which should have been considered under the Fourth Amendment's reasonableness test. The Ninth Circuit's failure to weigh factors of safety and health, which have been consistently recognized as compelling by the other circuit courts, resulted in the erroneous resolution of a critical constitutional question. In light of the railway industry's history of regulation, the diminished privacy expectations of railway employees, the minimally intrusive nature of the testing program and the lack of effective alternatives available to the FRA, the Ninth Circuit's insistence upon individualized suspicion was unwarranted.

The FRA's testing program satisfies the Fourth Amendment's reasonableness test, as it is justified at its inception and reasonably related in scope to the circumstances that gave rise to the government's concerns. The government enacted the program in response to a critical safety problem jeopardizing the lives of railway workers, passengers and the public. Adoption of the program was justified by the government's compelling concern for safety, as well as the history of intensive regulation and government involvement in the industry.

Moreover, railway employees' expectations of privacy, already diminished in the employment context, are greatly reduced where the performance of job functions implicates serious safety concerns. This diminution of privacy expectations has been consistently recognized by circuit courts where substance abuse is shown to endanger the safety of employees and the public.

The careful tailoring of the FRA program to the scope of the substance abuse problem in the railway industry further demonstrates its reasonableness. The FRA's lengthy and detailed study of substance abuse among railway employees revealed that there were no less intrusive means to control the problem. Recognizing the necessity of drug testing, the FRA developed precise guidelines incorporating extensive safeguards to minimize intrusiveness. Testing is permitted only in very narrowly defined circumstances where identification of drug usage is critical. The FRA program provides clear notice to employees who accept employment in sensitive positions, and strictly limits the exercise of discretion by railway officials through carefully designed procedural safeguards. Finally, the high professional and technical standards set forth in the regulations assure that railway employees are treated fairly and with dignity, allowing the government to preserve employee and public safety without infringing upon legitimate employee interests.

The reasonableness of the FRA's program is underscored by its moderation in comparison with comprehensive testing programs instituted by other public employers. Many would argue that the hazards posed by substance abuse in the railway industry justify random testing, and, in fact, numerous participants in the FRA-sponsored hearings advocated such testing to ensure maximum safety. In its final regulations, the FRA carefully balanced the need for safety with the interests of privacy. Finding that post-accident testing would allow identification of substance abuse in the workplace and could effectively deter abuse by employees in safety sensitive

positions, the FRA adopted a restrained and moderate approach which clearly meets constitutional requirements.

ARGUMENT

THE FEDERAL RAILWAY ADMINISTRATION'S DRUG TESTING PROGRAM SATISFIES THE FOURTH AMENDMENT'S REASONABLENESS TEST

I. PARTICULARIZED SUSPICION IS NOT CONSTITUTIONALLY REQUIRED

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The determination of constitutionality under the Fourth Amendment is therefore a contextual one. As this Court has stated:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.

Bell v. Wolfish, 441 U.S. 520, 559 (1979). In applying this reasonableness test, the Court has rejected any absolute "minimum standard" governing the constitutionality of searches in general, holding instead that "the specific content and incidents of [the individual's right to be free from unreasonable searches and seizures] must be shaped by the context in which it is asserted." *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

The Fourth Amendment's flexible, context-specific analysis precludes an insistence on individualized suspicion as a constitutional minimum. This Court has expressly recognized that fact, holding that while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure ... the Fourth Amendment imposes no irreducible

requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976).

Searches have been upheld in the absence of individualized suspicion in a number of contexts.⁸ In *Martinez-Fuerte*, for example, border patrol officials operating immigration checkpoints stopped automobiles for brief questioning of their occupants. These stops were challenged as unconstitutional in light of the officials' lack of any basis for believing that any particular vehicle contained illegal aliens. The Court noted several significant factors in finding the stops constitutionally reasonable. First, the Court noted that "this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Id.* at fn. 14. Secondly, the Court reiterated its position that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's own residence." *Id.* at 561. Third, the Court concluded that "the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal." *Id.* at 562. Finally, the Court noted "the need for this enforcement technique" in light of the ineffectiveness of less intrusive alternatives. *Id.*

Each of the Court's rationales for upholding the border patrol's practices in *Martinez-Fuerte* applies with equal force to the FRA regulations presently before the Court. The FRA, in conjunction with private railways themselves, has long regulated the use of illicit drugs by railway employees. Workplace substance abuse policies date almost from the inception of the

⁸ See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Wyman v. James*, 400 U.S. 309 (1971). See also *National Treasury Union v. von Raab*, *supra*; *McDonell v. Hunter*, *supra*; *Jones v. McKenzie*, *supra*; *Shoemaker v. Handel*, *supra*; and *Division 241 Amalgamated Transit Union v. Suscy*, *supra*.

railroad industry itself.⁹ Additionally, these regulations form only a small part of a far more comprehensive system of workplace regulation promoting employee and public safety in the railway industry. As Judge Alarcon's dissent to the Ninth Circuit's decision in this case illustrates, regulation has long encompassed a broad array of employee conduct.¹⁰

Further, consistent with *Martinez-Fuerte's* second rationale, legitimate expectations of privacy among employees in the railway industry are without doubt "significantly different from the traditional expectation of privacy and freedom in one's residence." As this Court has recognized, privacy expectations in the workplace "are far less than those found at home." *O'Connor v. Ortega*, ___ U.S. ___, 94 L.Ed.2d 714, 728 (1987). Employees' expectations of privacy may be reduced as a result of workplace "practices and procedures, or by legitimate regulation." *Id.* at 723. Extensive regulation has long existed in the railway industry, delimiting employees' legitimate privacy expectations. Those expectations are particularly circumscribed where the employee's workplace responsibilities implicate the safety of co-workers and the public.

⁹ In the introduction to its Proposed Rules, the FRA noted that "the problem of alcohol use on the railroads is as old as the industry itself, and efforts to deal with it through carrier rules and enforcement began more than a century ago." 49 Fed. Reg. 24252 (June 12, 1984).

¹⁰ In response to the majority's contention that regulation of the railway industry has traditionally focused on "proper maintenance of equipment and facilities," and not on railway employees, Judge Alarcon noted legislative and administrative proscriptions governing employee conduct since 1907. Judge Alarcon commented:

Contrary to the majority's argument, the government has a long tradition of regulating the conduct of railway personnel to promote public safety. The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs.

839 F.2d 575, 593.

As to *Martinez-Fuerte's* third rationale, the FRA regulations embody extensive procedural safeguards designed to minimize the intrusion on employee privacy interests. Testing is conducted only where life endangering events have transpired, or where reasonable suspicion is present. The regulations provide clear notice to employees who may be subject to testing, and narrowly circumscribe the exercise of managerial discretion. The regulations also specify highly accurate testing methodologies, providing the maximum scientific reliability possible, and stipulate that positive test results will be interpreted along with other available information in determining the appropriate employment decision. Each of these safeguards minimizes any intrusion upon individual privacy interests.

Lastly, the regulations at issue constitute the least intrusive means of achieving the government's purpose of eliminating undue risks to employee and public safety in the railway industry. The regulations were promulgated after several years of proceedings, during which the FRA examined the extent of the problem confronting it and considered "a wide range of options for action to address the [industry's] alcohol and drug problem." 49 Fed. Reg. 24252 (June 12, 1984). Post-accident drug testing was determined to be the least intrusive means of effectively controlling the critical problem of impairment-related railway accidents.¹¹

¹¹ In effect, the regulations combine a number of distinct and complementary approaches carefully tailored to the various manifestations of substance abuse among railway employees. In addition to requiring testing following major train accidents, the regulations provide for breath or urine tests where a supervisor has a "reasonable suspicion" based on personal observations that an employee is under the influence or is impaired by alcohol or drugs. Testing is also sanctioned in the event of a reportable accident or incident, where a supervisor reasonably suspects that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident, or in the event of certain specified rule violations. 49 C.F.R. 219.301.

The railway industry's history of regulation, railway employees' diminished expectations of privacy, the minimally intrusive nature of the FRA program and the lack of effective alternatives to drug testing in this case render the Ninth Circuit's adoption of an individualized suspicion standard erroneous. This Court's opinion in *Martinez-Fuerte* supports the conclusion that individualized suspicion is not required under the facts of this case.¹² The Court should reject the Ninth Circuit's unwarranted attempt to impose an individualized suspicion requirement on the FRA program, and should establish that insistence on such an "irreducible requirement" under the Fourth Amendment is improper in the context of a highly regulated, safety sensitive workplace.¹³

¹² The Ninth Circuit distinguished *Martinez-Fuerte* on the basis that the stops sanctioned in that case "do not approach the degree of intrusiveness involved in toxicological testing of body fluids." 839 F.2d at 586. However, the extent of the intrusion implicated by the drug testing of railway employees is just one factor to be considered along with a range of other factors under the Fourth Amendment's reasonableness test. The proper framework for consideration of those factors is discussed in Section II of this brief.

Other courts have relied on *Martinez-Fuerte*'s analysis of Fourth Amendment requirements in contexts similar to this one. For example, in *Ingersoll v. Palmer*, 241 Cal. Rptr. 42 (1987), the California Supreme Court relied extensively on *Martinez-Fuerte* in upholding the California Highway Patrol's use of traffic checkpoints to administer breathalyzer tests to motorists. The tests were administered to the driver of each fifth car passing through the checkpoint, without any individualized basis for suspecting intoxication. The court found that the breathalyzer program was justified by the state's "primary and overriding regulatory purpose of promoting public safety." *Id.* at 50.

¹³ This Court has recognized that government interests in the workplace, like those implicated by the exercise of law enforcement functions in *Martinez-Fuerte*, necessitate quick preventive action that typically cannot be achieved where individualized suspicion or probable cause requirements must be satisfied. As the Court explained in *O'Connor v. Ortega*, ___ U.S. ___, 94 L.Ed.2d 714 (1987):

(continued)

II. THE FRA'S POST-ACCIDENT DRUG TESTING PROGRAM IS CONSTITUTIONALLY REASONABLE

In *O'Connor v. Ortega*, ___ U.S. ___, 94 L.Ed.2d 714 (1987), this Court established that "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.* at 728. Under that standard, the Court must balance "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Id.* As the Court stated:

"Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception'; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"

Id. at 728-729 (citations omitted).

The FRA's post-accident testing of railway employees is constitutionally reasonable under the Court's twofold standard.

(ftn. continued)

[While] not enforcers of the criminal law . . . public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. In our view, therefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct . . . will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest.

Id. at 727.

Universally recognized concerns for employee and public safety, coupled with the diminished privacy expectations of railway employees, render the FRA testing program justified at its inception. Each of the circuits that has examined drug testing programs in the context of the safety sensitive workplace has upheld such testing in light of demonstrated hazards to employee and public well being. Further, given the dimension of the safety problem that prompted implementation of the FRA program, the lack of effective alternatives to uncover employee drug usage, and the program's comprehensive safeguards and carefully tailored, minimally intrusive provisions, it is clearly justified in scope.

A. The FRA Program Was Justified At Its Inception

1. The Government's Interest In Railway Safety Is Compelling

The FRA's study of railway safety was spurred both by its specific concern over the increasing incidence of serious accidents attributable to human error in the railway industry and by its more general awareness of the societal problem of alcohol and drug abuse. With approximately one out of every six American workers between the ages of 20 and 40 smoking marijuana at least once a month,¹⁴ the effect of substance abuse on job performance has been recognized in virtually all fields of endeavor. The U.S. Chamber of Commerce has estimated that as many as 23 percent of all U.S. workers use dangerous drugs on the job.¹⁵ Aside from the significant impact such use has on productivity, product quality and

¹⁴ NIDA Notes, U.S. Department of Health and Human Services, December 1986 at 3.

¹⁵ M. de Bernardo, *Drug Abuse in the Workplace: An Employer's Guide*, at 12 (1987).

workplace morale, serious safety risks resulting from workplace impairment are inevitable.

The FRA's exhaustive survey of railway injuries and safety hazards confirmed the broad impact of drug and alcohol abuse on the railway industry. The FRA found that substance abuse played a causal or contributory role in at least 10 accidents during the 13 month period ending January 31, 1988, resulting in a total of 18 deaths, 220 injuries, and over \$18 million in property damage.¹⁶ The most tragic accident occurred on January 4, 1987 near Chase, Maryland. That accident involved the collision of an Amtrak passenger train with three Conrail freight locomotives, resulting in 16 deaths and 174 injuries. The National Transportation Safety Board recently determined that the accident was attributable to the Conrail engineer's marijuana impairment. The engineer and front brakeman tested positive for marijuana usage, and both have subsequently admitted to having smoked marijuana prior to the accident.¹⁷

In an industry in which roughly one third of all accidents result from human error,¹⁸ in which the potential for destruction encompasses enormous property losses and public hazards such as toxic spills, and in which the lives of employees and the public are always in potential jeopardy, the government bears a weighty responsibility to assure safe operations. The use of drugs and alcohol by employees occupying safety sensitive positions is incompatible with that responsibility. "As recent history attests, locomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands."¹⁹ Given the extensive substance abuse problem in the railway industry, the FRA was clearly justified in instituting its drug testing

¹⁶ 53 Fed. Reg. 16641 (May 10, 1988).

¹⁷ *Id.*

¹⁸ 49 Fed. Reg. 24294 (June 12, 1984).

¹⁹ 839 F.2d at 596 (Alarcon, J. dissenting.)

program, having "reasonable grounds for suspecting that the search [would] turn up evidence" of dangerous substance abuse among railway employees. *New Jersey v. TLO*, 469 U.S. 325, 342 (1985). The government's interest in identifying and controlling drug usage by railway employees in safety sensitive positions is compelling and justifies the FRA's post-accident testing program.²⁰

2. Railway Employees' Expectations of Privacy Are Limited By The Employment Relationship

A critical factor in assessing the reasonableness of a search under the Fourth Amendment is the context in which the search occurs. As common sense dictates and this Court has recognized, an individual's reasonable expectations of privacy are necessarily diminished in the context of the employment relationship.²¹ Thus, for example, employers, including the government, may require employees as well as applicants for employment to undergo detailed physical examinations to determine fitness for employment. While such examinations

²⁰ The Sixth Circuit recently emphasized the importance of collecting and assessing evidence of substance abuse prior to instituting drug testing programs. In *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (1988) and *Penny v. Kennedy*, 846 F.2d 1563 (1988), the court rejected programs calling for mandatory drug testing of all firefighters and police officers "because there was not any evidence of a widespread or significant drug problem" in either department. The court found that "the potential gains to society of initiating mandatory drug testing are significantly lower than would have been the case if there had been evidence of a systematic drug problem." The FRA's detailed compilation and consideration of the serious and pervasive substance abuse problem among railway workers clearly satisfies the Sixth Circuit's standard.

²¹ See, e.g., *Connick v. Meyers*, 461 U.S. 138, 147 (1983); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).

might well intrude upon expectations of privacy where no special relationship exists between the government and the individual, they are universally accepted as within the government's prerogative in its capacity as employer.

In *O'Connor v. Ortega*, ___ U.S. ___, 94 L.Ed.2d 714, 723, (1987) this Court stated that, while individuals do not completely sacrifice their rights under the Fourth Amendment when they undertake to work for the government, "operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable." Thus "the privacy interests of government employees in their place of work . . . while not insubstantial, are far less than those found at home or in some other contexts." *Id.* at 728. The basis for this diminution of privacy rights in *O'Connor* was the public employer's "direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner." *Id.* at 727. Here the government's interest in operational efficiency is coupled with paramount concerns for employee and public safety. Clearly, an individual electing to work in a position implicating such preeminent safety concerns must reasonably be prepared to sacrifice privacy interests cognizable in other contexts.²²

The safety concerns delimiting the privacy interests of employees in the railway industry are compelling. An individual seeking employment in that industry is confronted not only with the recent history of drug and alcohol related catastrophes, but with the long-established, virtually all-encompassing regulation of railway practices and personnel.²³ In under-

²² The Sixth Circuit in *Lovvorn v. City of Chattanooga*, *supra* at fn. 20, succinctly articulated this observation, stating that "if the potential harm to society of an impaired public employee is likely to be very large, society will be less willing to consider reasonable that employee's subjective expectations of privacy."

²³ The government's comprehensive regulation of the railway industry formed the basis for the district court's finding that the FRA regulations were constitutionally permissible under the pervasively regulated industry standard. In balancing the competing interests of

taking work in a train crew, that individual accepts the responsibility for affirmatively safeguarding the lives of fellow crew members, passengers and the public.²⁴

3. Other Circuits Have Found Such Testing to Be Reasonable In Light of Compelling Safety Concerns

In finding that the FRA's drug testing program was not a reasonable response to demonstrated substance abuse problems,

(ftn. continued)

the government and employees in the railway industry, the district court emphasized that "the railroad industry is one of the most extensively regulated industries that we have in interstate commerce [and] the regulation extends not just to the railroads themselves, but [includes] a certain amount of regulation of the employees." Regardless of whether this Court applies the Fourth Amendment standard for "pervasively regulated industries," the history and extent of government regulation of employee conduct in the railway industry significantly impacts the reasonableness of the FRA's testing program. The extensive regulation of the railways not only manifests the weight of the government's concern for employee and public safety; it simultaneously provides notice to individuals who choose to work in the industry that various practices which might be considered private in the home may become the focus of government interest and investigation in the context of government employment. Cf., *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), noting that "when jockeys chose to become involved in this pervasively-regulated business . . . they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry."

²⁴ The Ninth Circuit has recognized that notice of testing limits employees' reasonable expectations of privacy. In *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987), the court found that an employee "would enjoy a reasonable expectation of privacy . . . unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes." *Id.* at 1335.

the Ninth Circuit strayed from the holdings of every other circuit court which has addressed the issue of drug testing in safety sensitive industries. The Ninth Circuit properly stated that determining the reasonableness of such a program "requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion.' " However, in applying that standard, the circuit court "failed to engage in the balancing of interests required by the Supreme Court." 839 F.2d 575, 597, Alarcon, J. dissenting.

All three circuit courts that reviewed drug screening in safety-sensitive industries prior to *Burnley* upheld the testing in light of compelling safety concerns. In *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976), the Seventh Circuit addressed the constitutionality of a drug testing program in a factual setting similar to this case. *Suscy* involved rules of the Chicago Transit Authority requiring urine and blood testing for alcohol or drug usage of operating employees immediately following a serious accident. In arguing that the rules were reasonable, the Transit Authority relied on the obvious threat employee intoxication posed to the safety of mass transit riders. In light of this argument, the Seventh Circuit found the employees' Fourth Amendment rights outweighed by the employer's "paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs." *Id.* at 1267 (emphasis supplied).

In *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), the District of Columbia instituted a program involving the routine drug testing of school transportation employees. That action was taken pursuant to the District's identification of "a veritable 'drug culture' among Transportation Branch employees." *Id.* at 40. The tests, administered as part of the employees' periodic physical examinations, were required of all

bus drivers, mechanics, and bus attendants.²⁵ In evaluating the constitutionality of the program, the circuit court balanced the intrusion on Fourth Amendment privacy interests against the government interest involved. The court acknowledged that "strong privacy interests" were implicated by the testing program, but noted the existence of "serious safety concerns on the other side of the balance." *Id.* at 340 (emphasis in original). In reconciling these interests, the court stated that "a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or others." *Id.* (emphasis supplied). Given the existence of such a compelling interest in physical safety, the circuit court held the testing program to be reasonable, and thus constitutional.

Finally, the Eighth Circuit upheld drug testing of prison employees in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987). In *McDonell*, the Iowa Department of Corrections adopted policies requiring correctional employees to submit to urine tests upon the request of Department officials. The court, while finding that such testing plainly implicated the employees' Fourth Amendment rights, upheld the drug screening "in light of the difficult burdens of maintaining safety, order and security that our society imposes on those who staff our prisons." *Id.* at 1306. In so holding, the Eighth Circuit recognized that "the institutional interest in prison security is a central one," and that "the only way [the use of drugs by employees] can be controlled in a satisfactory manner is to permit . . . testing." *Id.* at 1308.

In contrast to these decisions, the Ninth Circuit in *Burnley* focused "solely on the degree of impairment of the workers'

²⁵ The district court upheld the testing program as to bus drivers and mechanics, but found it unconstitutional as to bus attendants, who were not "directly responsible for the operation and maintenance of school buses." 628 F.Supp. 1500, 1508. The circuit court's decision rejected that distinction, finding the lesser safety concerns implicated in the performance of the attendants' jobs "still quite significant." 833 F.2d 335, 340.

privacy interests," completely circumventing any discussion of the government's legitimate and compelling concern for public safety. 839 F.2d 575, 597 (Alarcon, J. dissenting). Yet it is the weight of that concern, when balanced against the individual's privacy interest, that justifies the testing. The FRA regulations were promulgated in response to a serious problem involving alcohol and drug abuse in the railroad industry. As is the case in a wide range of industries, employee use of drugs and alcohol poses a serious hazard to the safety of co-workers and the general public. That fact was recognized by each of the other circuits to address this issue, as well as by the district court and the Railway Labor Executives' Association in this case.²⁶ Thus, the majority's analysis in *Burnley* is contrary to the holdings in *Suscy*, *Jones*, and *McDonell*. The Ninth Circuit's decision reflects that court's de facto abandonment of the balancing test mandated under the Fourth Amendment, and should be reversed.²⁷

²⁶ The district court found that testing served the government's interest in "railway safety, safety for employees, and safety for the general public." The RLEA concedes that substance abuse poses a serious threat to the safe operation of the nation's rail systems.

²⁷ The FRA's restrained approach to the serious problem of substance abuse in the railway industry compares favorably with the programs adopted by the governmental entities in *Suscy*, *Jones* and *McDonell*. In contrast to the Transit Authority's adoption of post-accident testing in *Suscy*, the FRA's promulgation of the regulations in this case followed detailed documentation and review of the problem of substance abuse among railway employees. The FRA's careful consideration of extensive data buttressed its conclusion that post-accident testing was a necessary component of an effective testing program. Further, while periodic testing was found reasonable in *Jones* and random testing was upheld in *McDonell*, the FRA regulations mandate testing *only* following major train accidents and fatal incidents. Surely, this restrained approach is reasonable given the compelling safety interests involved in the railway industry.

B. The FRA Program Is Reasonably Related In Scope To The Railway Industry's Safety Concerns

1. Post-Accident Testing Is The Least Intrusive Means of Identifying Dangerous Substance Abuse Among Railway Employees

The Ninth Circuit's rejection of the FRA drug testing program was premised on the court's conclusion that limiting testing to cases where individualized suspicion could be shown "poses no insuperable burden on the government." However, as each of the circuit courts that has addressed the issue of workplace drug testing has found, requiring individualized suspicion prior to testing effectively precludes the timely discovery of hazard-causing substance abuse.

The regulations at issue represent the FRA's reasoned attempt, supported by years of analysis and debate, to responsibly address the problem of drug usage in the workplace. Prior to the adoption of the FRA regulations, employers in the railway industry, like most other employers, relied on the observations of supervisors for identification of workplace impairment. The FRA's study of employee drug and alcohol usage in the industry revealed serious obstacles to the detection of workplace impairment through such informal observatory techniques.

The principle obstacle is the absence, in many instances, of observable symptomatology. The FRA's study found that many workers whose impairment posed legitimate safety risks to themselves and others manifested no easily detectable signs of impairment. This was found to be true of employees imbibing low to moderate amounts of alcohol adequate to substantially affect "choice reaction time" critical to the safe operation of

railroad vehicles.²⁸ Moreover, the FRA found that alcoholics and other habituated drinkers "may be able to achieve elevated [blood alcohol content levels] (even in excess of .30 percent) without showing outward signs that would be evident to a person with limited training."²⁹ In fact, no level of training was found to provide an adequate guarantee of detection in critical situations.³⁰ Finally, the FRA found detection of drug-related impairment to be virtually impossible in many instances, due to the fact that many drugs "produce effects much more subtle or complex (and sometimes more pernicious) than alcohol."³¹

Two further problems render observation by supervisors an inadequate and undesirable alternative to drug testing. First, employees in the railway industry often work largely or entirely

²⁸ 50 Fed. Reg. 31,508, 31,536 (August 2, 1985).

²⁹ 50 Fed. Reg. 31,526.

³⁰ The FRA noted that studies of bartenders and even police officers had shown significant inability to identify levels of alcohol-related impairment. 50 Fed. Reg. 31,526.

³¹ 50 Fed. Reg. 31,527. The difficulty of detecting drug-related impairment has been noted by numerous courts and authorities. As the Eighth Circuit recently stated:

[T]he use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. The intoxicating effect of these substances is said to be primarily mental or emotional; *a user's judgment or clear-headedness may be impaired without any obvious physical sign of intoxication.* It is the *insidious nature of these substances* that too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene.

Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co., 802 F.2d 1016, 1020 (8th Cir. 1986) (emphasis supplied).

in isolation from others and thus are not subject to frequent supervisory observation. In these instances occasional supervisory checks provide an inadequate safeguard against impairment and actual on-the-job drug use. This problem was attested to by the engineer responsible for the Amtrak accident on January 4, 1987. In a tragically honest statement before Congress, he stated:

Use of the reasonable suspicion standard would not have detected any problem with my behavior on January 4, 1967. I had not ingested any alcohol or drugs prior to reporting for work that morning. Detection can be circumvented by drinking or doing drugs while on the engine. Sometimes crews stop the engines to purchase beer and consume it on the engine.

Secondly, even where supervisors are routinely present and are trained to detect symptoms of drug and alcohol use and impairment, efforts at detection can be highly intrusive. Given the lack of easily identifiable symptoms, adequate efforts at detection of impairment necessarily involve close scrutiny of behavioral patterns and probing questioning of employees suspected of drug use. Moreover, a high degree of individual discretion is implicated, a factor often found to render searches unreasonable. Sensitive of these problems and the potentially severe disciplinary consequences for reported employees, supervisors are reluctant to accept the responsibility for identifying impairment where the employee's symptoms of drug or alcohol usage are not obvious. The FRA regulations recognize these concerns in their multi-pronged approach to identifying drug and alcohol usage, and represent a balanced, reasonable and moderate attempt to address that problem.

2. FRA Testing Safeguards Assure Minimal Intrusion Upon Employees' Privacy Expectations

The careful design and expansive safeguards embodied in the FRA's testing procedures undercut any claim of unwarranted intrusiveness. The scope of the testing program is narrowly tailored to respect employees' reasonable expectations of privacy. As noted above, testing is required only where reasonable suspicion exists or where the employee is involved in a specified accident, incident or rule violation. Employees who exhibit no overt signs of impairment and do not occupy safety sensitive positions are not required to submit to testing. Employees in sensitive positions are required to submit to testing only where a safety hazard has occurred, and even then need not undergo testing if it can be "immediately determine[d], on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident." 49 C.F.R. 219.203(a)(3)(i). Thus the scope of the employee group required to submit to testing is narrowly defined.

The manner in which testing is performed further minimizes the program's intrusiveness. First, the clear language of the FRA regulations provides notice to employees that they will be subject to post-accident testing should they undertake to work in safety-sensitive positions. This notice effectively forecloses any possibility of an "unsettling show of authority" indicative of unexpected intrusions upon privacy. *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). Secondly, the FRA's precise guidelines as to when employees must undergo testing provide safeguards and strictly limit the discretion of railroad officials. Such strict limits on discretion render testing consistent and predictable for railway employees.³² Lastly, the highly

³² Official discretion has consistently been recognized as presenting a threat of unreasonable invasion of privacy, thus necessitating the availability of other safeguards. *Delaware v. Prouse*, *supra*, at 655.

professional and technically advanced testing methodology contemplated by the regulations assures that test results provide accurate and useful information to the railroad employer.³³ Under the regulations, testing is conducted at independent medical facilities by qualified medical personnel. Samples are retained for no less than six months, and reliable confirmatory tests are required where the initial test is positive for a substance other than alcohol.³⁴ 49 C.F.R. 219.307(b). Further, where testing is conducted in anticipation of disciplinary proceedings, the employee is afforded an opportunity to provide a blood sample to ensure accurate findings. Clearly, the FRA regulations' extensive safeguards assure that the government's attempts to identify and control critical substance abuse problems do not intrude upon reasonable privacy interests of railway employees.

³³ The Ninth Circuit concluded that testing was not "reasonably related" to railway safety since tests by themselves cannot conclusively establish current impairment. However, the FRA testing guidelines provide that the results of drug tests be considered along with other relevant data in making the ultimate determination of impairment. In fact, the notice to employees concerning testing recognizes that blood tests only provide information "pertinent to current impairment."

³⁴ The testing procedures under the FRA program are substantially similar to those of the Customs Service program in *von Raab*, discussed in CELC's *amicus* brief in that case. The accuracy of those procedures is examined in detail in the *amicus* brief filed on behalf of PharChem Laboratories and the Syva Company in that matter.

CONCLUSION

The Federal Railway Administration's drug testing guidelines constitute a moderate, appropriate and constitutionally permissible response to the compelling problem of substance abuse in the railway industry. For that reason and each of the reasons stated above, the decision of the court of appeals should be reversed.

Dated: July 27, 1988.

Respectfully submitted,

VICTOR SCHACHTER *
LAWRENCE HECIMOVICH

SCHACHTER, KRISTOFF,
ROSS, SPRAGUE & CURIALE

Attorneys for Amicus Curiae
California Employment Law Council

* Counsel of Record

(15)
No. 87-1555

Supreme Court, U.S.
FILED
JUL 28 1988
JOSEPH E. SPANOL, JR.
CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1987

**JAMES H. BURNLEY, IV, SECRETARY
DEPARTMENT OF TRANSPORTATION, ET AL.
PETITIONERS**

v.

**RAILWAY LABOR EXECUTIVES ASSOCIATION, ET AL.
RESPONDENTS**

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF OF BENDINER-SCHLESINGER LABORATORY,
THE AMERICAN INSTITUTE FOR DRUG DETECTION,
AND THE NATIONAL SUBSTANCE ABUSE CONSULTANTS
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

William J. Judge*
431 South Dearborn
Chicago, IL 60605
(312)-939-7709

David G. Evans
30 Cold Soil Rd.
Lawrenceville, NJ 08648
(609)-896-3923

Michael M. Judge
2325 Carpenter, Suite 1
Des Moines, IA 50311
(515)-277-2774

* Counsel of Record

Attorneys for Amici Curiae

QUESTION PRESENTED

Whether the Ninth Circuit erred when it determined that the Federal Railroad Administration drug testing regulations were unreasonable in scope because the test results are incapable of detecting drug intoxication or impairment and because the results are unreliable.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
FACTUAL SUMMARY	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. The Ninth Circuit's determination regarding the reasonableness of FRA Regulation Sec. 219 was in error	6
A. When determining the reasonableness of the FRA Drug Testing Program, the court ignored or misunderstood relevant scientific principles	6
1 The purpose of FRA Section 219	9
2 The Scientific principles of Drug Testing	10
a. Laboratory Procedures	12
b. The Procedure Results	16
II. The FRA Regulatory scheme is legally defensible	18
III. Positive Drug Test Results from a legally defensible program pose an unacceptable risk to a common carrier	36
IV. Conclusion	38

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Bishop v. Wood</i> , 426 U.S. 341 (1976).	33
<i>Board of Regents v. Roth</i> , 408 US 564 (1972)	33
<i>Brotherhood of Maintenance of Way Employees v. Burlington Northern R. R.</i> , 802 F. 2d 1016 (8th Cir. 1986)	
<i>Brown v. Smith</i> , 132 NY Misc. 2d 686, 505 N.Y.S. 2d 743 (1985)	26
<i>Bulkin v. Western Kraft East, Inc.</i> , 422 F. Supp. 437 (E.D. Pa., 1976)	26
<i>Burnley v. R.L.E.A.</i> , (Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit No.87-1555, March 1988 at 2-4).	19
<i>Capua v. City of Plainfield</i> , 643 F. Supp. 1507 (D.N.J. 1986)	23
<i>Caruso v. Ward</i> , 131 NY Ad 2d 214, 520 N.Y.S. 2d 551 (A.D. 1, Dept. 1987)	19
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985)	34
<i>Copeland v. Philadelphia Police Dept.</i> , 840 F.2d 1139 (3rd Cir.1988)	23
<i>Division 241 A.T.U. v. Suscy</i> , 538 F.2d 1264, 7th Cir.) cert denied, 429 U.S. 1029 (1976)	9, 19
<i>Dornak v. Lafayette General Hospital</i> , 399 So. 2d 68 (La. 1981)	26
<i>Everett v. Napper</i> , 632 F. Supp. 1481 (N.D. Ga.1986)	34

<i>Feliciano v. City of Cleveland</i> , 661 F. Supp. 578 (N.D. Ohio 1987)	23
<i>Franklin v. Office of Court Administration</i> , 2 IER Cases (BNA)783 (NY S. Ct. 1987)	32
<i>Gibson v. Berryhill</i> , 411 U.S. 564 (1973).	34
<i>Heron v. McGuire</i> , 803 F. 2d 67 (2nd Cir. 1986)	23
<i>Hester v. City of Milledgeville</i> , 598 F. Supp. 1456 (MD Ga. 1984)	34
<i>Houston Belt and Terminal Rigging Co. v. Wherry</i> , 548 S.W. 2d 743 (Tex. Civ. App. 1977) cert denied 434 U.S. 962 (1977).	31
<i>Joint Anti-Fascist Refugee Committee v. McGrath</i> , 341 U.S. 123 (1951).	33
<i>Jones v. McKenzie</i> , 833 F. 2d. 335 (D.C. Cir. 1987) petition for certiori, 56 U.S.L.W. 2303 U.S. April 22, 1988) No. 87-2706)	7, 9, 38
<i>Jones v. Pennsylvania Board of Probation and Parole</i> , 103 Pa C. 602, 520 A.2d 1258 (Pa. Cmwlth. 1987)	32
<i>Lahey v. Kelly</i> 71 NY 2d 135, 518 NE 2d 924, 524 N.Y.S.2d 30 (Ct. App. 1987)	35
<i>Lovvorn v. City of Chattanooga</i> , 647 F. Supp. 875 (E.D. Tenn. 1986), aff'd 3 IER Cases (BNA) 673 (6th Cir. May 23, 1988)	34
<i>McLeod v. City of Detroit</i> , 39 FEP Case 225 (E.D. Mich 1985)	23
<i>McDonell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987);	9, 23

<i>National Treasury Employees Union v. Von Raab</i> , 816 F.2d 170 (5th Cir. 1987) stay denied 107 S. Ct. 2479 (1987), cert granted 56 U.S.L.W. 3590, (Feb. 29, 1988) (No. 86-1879)	9, 18, 29
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	7
<i>O'Brien v. Papa Gino's of America, Inc.</i> , 780 F.2d 1067 (1st Cir. 1986)	31
<i>Paul v. Davis</i> , 424 U.S. 693 (1976)	33
<i>Peranzo v. Coughlin</i> , 675 F. Supp. 102 (S.D. N.Y. 1987)	35
<i>Perry v. Sindermann</i> , 408 US 593 (1972)	33
<i>Policeman's Benevolent Assn. of New Jersey v. Township of Washington</i> _____ F.2d _____, 3 IER Cases (BNA) 699, (3d Cir. June 21, 1988)	8, 19
<i>Railway Labor Executives' Assn.. v. Burnley</i> , 839 F. 2d 575 (9th Cir. 1988)	3, 7, 4, 6
<i>Rodriguez v. Pennsylvania Board of Probation and Parole</i> , 101 Pa C. 289, 516 A2d 116, (Pa.Cmwlth.,1986)	32
<i>Rushton v. Nebraska Public Power District</i> , 653 F. Supp. 1510 (D. Neb. 1987), aff'd 3 IER Cases (BNA) 257, (8th Cir. April 14, 1988)	9, 18
<i>Shoemaker v. Handel</i> , 795 F. 2d 1136 (3rd. Cir. 1986) cert denied, 107 S. Ct. 577 (1986)	21, 34
<i>Slochower v. Board of Education</i> , 350 U.S. 551 (1956)	34

<i>Terry v. Ohio</i> , 392 U.S. 1(1968)	7
<i>Turner v. Halliburton Co.</i> , 240 Kan 1, 722 P.2d 1106 (Kan. 1986);	31
<i>United States v. Ford</i> , 23 MJ 331 (CMA 1987)	26
<i>United States v. Hagan</i> , 24 MJ 571 (NMCMR 1987)	26
<i>Vasquez v. Coughlin</i> , 118 N.Y.A.D. 2d 897,499 N.Y.S. 2d 461 (A.D. 3 Dept. 1986)	35

STATE STATUTES

<u>California</u> , Senate Bill No. 1611	22
<u>Illinois Clinical Laboratory Act</u> sec. 8-101, (Ill. Rev. Stat. ch. 111 1/2 par 628-101)	26,28, 29, 30
<u>Iowa</u> , Sec. 7305, HF 469, L 1987, (effective July 1, 1987)	22
<u>Maine</u> , Bill L.D. 156	
<u>Minnesota</u> Paragraphs 181. 950-957, (effective September 1, 1987)	22
<u>Minnesota</u> , Ch. 388L (1987) §181.954(4)	8
<u>New Jersey</u> , Assembly Bill 2850	22
<u>Utah</u> , Utah Code Annotated, Sec. 34-38-1, (effective 1987)	22
<u>Vermont</u> , Vermont Annotated T-21 Sec. 511 (effective September 1987)	22

OTHER AUTHORITIES

Chiang, <i>Implications of Drug Levels in Body Fluids: Basic Concepts</i> , 73 NIDA Research Monograph 62 (1986)	12, 36
---	-----------

Comment, <i>Constitutional Law: Urinalysis and the Public Employer - Another Well Delineated Exception to the Warrant Requirement?</i> 39 Okla. L. Rev. 257, 271-71 (1986);	21
Council Report, <i>Scientific Issues in Drug Testing</i> , 25 J.A.M.A. 3110 (June 1987)	11,12, 13,14,16
Blanke, <i>Accuracy In Urinalysis</i> , 73 NIDA Research Monograph (1986); DHHS Publication Number (ADM) 87-1481).	11
Boone, <i>Reliability of Urine Drug Testing, Q and A</i> , 258 J.A.M.A. 2587 (1987)	11, 14
Donegan and Angarola, <i>Drug Testing in the Workplace: A Clash of Rights</i> , Legal Times, August 4, 1986	15
<i>Down on Drugs: A Newsweek Poll</i> Newsweek, August 11, 1986, p. 16.	20
Ellis, <i>Excretion Patterns of Chronic Cannabinoid Users</i> , 38 Clin. Pharm. & Ther. 57 (November 1985)	16
Evans, <i>Drug Testing, Work Performance, and EAP's: Recent Legal Guidelines</i> The Almacan, December 1986 at 33	22
Goodman and Gilman, <i>Pharmacological Basics of Therapeutics</i> (New York: McMillan & Co. 1985)	37
Hawks, <i>Analytical Methods</i> , 73 NIDA Research Monograph 30 (1986)	13, 14, 15, 16
Higginbotham, <i>Urinalysis Testing Programs in Law Enforcement</i> " F.B.I. Law. Enf. Bulletin, Nov. 1986 at 25, 28	21
Hoyt, <i>Drug Testing in the Workplace - are Methods Legally Defensible?</i> " 258 Journal of the American Medical Association, 504 (July 1987) Vol. 258, No. 4, at 504.	14, 15, 16

Imwinkelried, <i>The Identification of Original, Real Evidence</i> 61 Mil. L. Rev. 145 at 159.	26
Imwinkelried, <i>The Methods of Attacking Scientific Evidence</i> (Charlottesville, VA: The Michie Co. 1982) at 83, 89,90	26
Lamar, <i>Rolling Out the Big Guns: The First Couple and Congress Press the Attack on Drugs</i> Time, September 22, 1986, p. 26;	20
Manno, <i>Interpretation of Urinalysis Results</i> , 73 NIDA Research Monograph 54 (1986)	16
McBay, <i>Drug-Analysis Technology - Pitfalls and Problems of Drug Testing</i> , 33 Clinical Chemistry 33B-39b (1987)	17
McBay and Mason, <i>Cannabis: Pharmacology and Interpretation of Effects</i> , 30 J. of Forensic Sci., 615 (July 1985)	37
McBay, <i>Urine Testing For Marijuana Use</i> , 249 J.A.M.A. 881 (1983)	11, 16
<i>Introduction to Forensic Toxicology</i> , Cravey and Baselt, eds. Biomedical Pub (1981)	12, 17
<i>Most Favor Mandatory Testing, Poll Concludes</i> , The Davis Enterprise, September 15, 1986, p. 2;	20
Rothstein, <i>Screening Workers for Drugs: A Legal and Ethical Framework</i> , 11 Employee Rel. L.J. 422, 423 (1985).	21
Rothstein, <i>Medical Screening of Workers</i> , 81 (BNA Books 1984)	36
Soderstrom, <i>Marijuana and Alcohol Among 1023 Trauma Patients</i> , 123 Arch. Surg. 733-739 (June 1988)	37
USA Today, Survey, March 1986	20
Wisotsky, <i>The Ideology of Drug Testing</i> , 11 Nova Law Review 763, 774 (1987)	10

FEDERAL REGULATIONS

Federal Railroad Administration, Control of Alcohol and Drug Use, 49 C.F.R. sec. 219.401 (1987)	
<i>passim</i>	23, 24, 25, 26, 27, 29, 31, 32, 35, 37

ADMINISTRATIVE AND EXECUTIVE MATERIALS

"Drug-Free Federal Workplace", Exec. Order 12,564, 51 Fed. Reg. 32889 (1986).	21
"Mandatory Guidelines for Federal Workplace Drug Testing Programs", 53 Fed. Reg. 11970 (1988). <i>passim</i>	11, 24, 25, 26, 28, 29, 31, 32,35

MISCELLANEOUS

Rule 401, Federal Rules of Evidence	17
Rule 402, Federal Rules of Evidence	17
Rule 702, Federal Rules of Evidence	17
Brief of the College of American Pathologist, as <i>Amicus Curiae</i> , in support of Respondent, <i>N.T.E.U. v. Von Raab</i> , Supreme Court of the United States, No. 86-1879, submitted June 18, 1988.	28
2 Restatement of Torts 2d, §314A (1) (a)	36
52 NIDA Research Monograph, 102-103, 118-119, 127, 137, 142, 146 (1984)	37

INTEREST OF AMICI CURIAE

Since 1843, *Amicus Curiae*, Bendiner and Schlesinger, Inc., has been providing high quality medical services. The toxicology department laboratory provides drug testing services to clients throughout New York State and is certified under Title XVIII of the Social Security Act, which is administered by the federal Department of Health and Human Services. This certification includes periodic inspections of the laboratory and participation by the laboratory in a proficiency testing program. The laboratory is fully licensed for forensic toxicology by the state of New York.

Amicus Curiae, American Institute for Drug Detection, (AIDD), with facilities located in Rosemont, Illinois, and Dallas, Texas, is a forensic toxicology laboratory licensed in the states of Illinois and Texas and certified under Title XVIII of the Social Security Act. AIDD is an accepted participant in both the National Institute on Drug Abuse (NIDA) laboratory certification program and the College of American Pathology (CAP) laboratory accreditation program.

Amicus Curiae, National Substance Abuse Consultants, Inc., is a national network of affiliated attorneys and professional consultants from the various disciplines which impact substance abuse in the workplace and on college campuses. NSAC has counseled local, state, and federal governments, businesses of all sizes, and colleges, regarding all aspects of confronting substance abuse including detection, prevention, intervention, policy and procedure development, employee assistance and student assistance programs, treatment and the law.

Amici believe that their experience and expertise will be of assistance to the Court in this case.¹

FACTUAL SUMMARY

This matter is before the court on a grant of a writ of *certiorari* (June 6, 1988), appealing the Ninth Circuit Court of Appeal's reversal of the District Court's grant of summary judgement to Petitioner, the Secretary of the Department of

¹ Pursuant to Rule 36 of the Court's Rules, the parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of this Court,

Transportation (839 F. 2d 575). At issue is the Railway Labor Executives' Association (R.L.E.A.) challenge to the Federal Railway Administration (FRA) regulations mandating blood and urine tests of railroad employees. The challenge arises under the search and seizure clauses of the fourth amendment.

Determining that the drug tests constitute a fourth amendment search, the Ninth Circuit concluded that "particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception." (839 F.2d,587). The court based this conclusion primarily upon its determination that, because railroad employees are historically not the focus of FRA Regulations, the "administrative search exception" to the fourth amendment's warrant requirement does not apply (839 F. 2d, 585). Therefore, absent individualized suspicion, the required drug tests failed to satisfy the first prong of the two-prong fourth amendment reasonableness test which requires that a search be justified at its inception.

The Ninth Circuit further concluded that the testing program was not reasonably related to the "professed purpose" of the tests , "because the tests cannot measure current drug intoxication or degree of impairment." (839 F. 2d, 588). The FRA Regulations requiring drug tests did not, therefore, satisfy the second prong reasonable-in-scope requirement of the fourth amendment standard.

SUMMARY OF ARGUMENT

Amici take issue before this Court with the Ninth Circuit's finding that the FRA drug testing program was unreasonable in scope . It is *Amici's* position that the Ninth Circuit's preoccupation with the issue of impairment resulted in its misinterpretation of the FRA primary purpose in issuing the challenged regulations. The Court mistakenly concluded that the FRA purpose for issuing the drug testing guidelines was to detect current drug intoxication and impairment of railroad employees. However, it is evident from the court's own account of the Regulations' development that employee and public safety were paramount. 839 F.2d, 589.

Because the Ninth Circuit misunderstood the primary purpose of the regulations, it declared the drug test results to be unreliable in detecting drug intoxication or employee impairment. The Court concluded that the FRA program, based upon such test results, is unreasonable in scope. Oddly, the Ninth Circuit found that these same test results, when combine with individualized suspicion "should withstand scrutiny under the scope prong of the reasonableness standard" and "would provide a sound basis for appropriate disciplinary action." 839 F.2d, 589 .

Amici urge this Court to recognize that it is generally acknowledged among forensic toxicologists that current drug test methodologies, properly utilized, can accurately and reliably detect recent drug use. Neither the toxicology methods employed nor test reliability depend upon the manner in which an individual is selected (randomly, during scheduled medical examination or based upon individualized suspicion). Likewise, the testing methods utilized in the laboratory will not be altered depending upon the nature of employer discipline imposed in response to the results.

The Ninth Circuit improperly allowed its preoccupation with impairment to color its judgement. The court failed to recognize that the common carrier employer has a right and a duty to take all necessary steps to ensure the safety of employees and the public and to protect its property. Drug tests, conducted pursuant to an otherwise legally defensible substance abuse program, are reliable and reasonably related to the common carrier's safety goals.

This Court is urged to recognize the Ninth Circuit's error and to acknowledge the scientific communities' general acceptance of the testing methods involved.

ARGUMENT

I. THE NINTH CIRCUIT'S DETERMINATION REGARDING THE REASONABLENESS OF FRA REGULATION SECTION 219 WAS IN ERROR.

A. WHEN DETERMINING THE REASONABLENESS OF THE FRA DRUG TESTING PROGRAM, THE COURT IGNORED OR MISUNDERSTOOD RELEVANT SCIENTIFIC PRINCIPLES.

The Ninth Circuit determined that urinalysis mandated or authorized by the FRA regulations constitutes a search under the fourth amendment to the United States Constitution ². As such, the drug tests must satisfy both prongs of the well established two-prong fourth amendment reasonableness test; first, the search must be "justified at its inception ; and second, the search as actually conducted must be "reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)) The Ninth Circuit found that the FRA authorized drug tests ³ failed both prongs of this two-prong test. First, drug testing is not

² The Fourth Amendment to the United States Constitution states, in relevant part:

"The right of the people to be secure in their persons, houses, papers and effects , against unreasonable searches and seizures, shall not be violated..."

(U.S. Constitution, amend. IV)

³ It is noted that the FRA Regulations challenged by RLEA also authorize blood-alcohol testing under the same circumstances which might give rise to urinalysis for drug use. Because the Ninth Circuit did not specifically address the blood-alcohol tests, *Amici* will limit their discussion to the court's conclusions regarding drug testing.

justified at its inception absent individualized suspicion. Second, the drug tests were not reasonably related to the purpose of the FRA drug testing program "because the tests cannot measure current drug intoxication or degree of impairment." 839 F.2d, 588 .

The court then concluded, however, that these same drug tests would be appropriate and "would provide a sound basis for appropriate disciplinary action" when combined with individualized suspicion. 839 F. 2d, 589. The court's reasoning reflects a misunderstanding of both the purpose of the FRA drug testing program and the scientific principles involved. ⁴

⁴ Although *Amici* limit their present discussion to the Ninth Circuit's erroneous determination of the scope and reliability of the drug tests, we nonetheless note our support for the FRA position that the testing program was reasonable at its inception. The FRA regulations are not ultimately intrusive. Subpart 219, (49 CFR Part 219) does not mandate or authorize random testing of employees. Moreover, *Amici* submit that the Ninth Circuit committed reversible error when it concluded that the "administrative search exception" to the fourth amendment did not apply. *Amici* urge this Court to adopt the conclusion and reasoning of the Third Circuit Court of Appeals in its June 21, 1988 decision, *Policeman's Benevolent Association of New Jersey, Local 318 et al.v. The Township of Washington*, ____ F.2d. ____, 3 IER Cases (BNA) 699, 704 (June 21, 1988), in which the court found the "administrative search exception" applicable to a random drug testing program. Accord,

1. THE PURPOSE OF FRA SECTION 219

As discussed in the Solicitor General's petition for writ of *certiorari* before this court, the principal purpose of the challenged regulations is to ensure employer and public safety. That purpose and the evidence supporting the need for the challenged regulations will be adequately discussed by the Solicitor General before this court. *Amici* will not attempt to expand upon the Government's position but note our concurrence. It was the court's misunderstanding of the

Rushton v. Nebraska Public Power District, ____ F.2d. ____, 3 IER Cases (BNA) 257 (8th Cir. April 14, 1988); *National Treasury Workers Union v. Von Rabb* 816 F.2d. 170 (5th Cir. 1987), stay denied, 107 S.Ct. 2479 (1987) cert. granted 56 U.S.L.W. 3590, (Feb 29, 1988); *Division 241 A.T.U. v. Suscy*, 538 F. 2d, 1264 (7th Cir. 1976), cert. denied 429 U.S. 1029 (1976). *McDonell v. Hunter*, 809 F.2d. 1302 (8th Cir. 1987) The Ninth Circuit denied the application of this exception after concluding railroad employees were not the focus of the FRA Regulatory scheme. However, it is certain that all railroad employees clearly play a vital role in transportation safety. Anyone who denies the significance of that role or that operating employees are the focus of the FRA Regulatory scheme does so at a distance from reality. See, *Jones v. McKenzie*, 833 F.2d. 335 (D.C. 1987), petition for *certiorari* filed, 56 U.S.L.W. 2303. (where the Court stated that it would be "patently irresponsible" for school officials to ignore suggestions of drug use among transportation department employees and that drug testing aimed at ensuring safety of students was a strong government concern; the court stated that any suggestion to the contrary "would be preposterous".)

Regulatory safety purpose which led, in part, to the erroneous conclusion that the test methods are unreliable and unreasonable in scope.

2. THE SCIENTIFIC PRINCIPLES OF DRUG TESTING

Like many others faced with determining drug testing issues, the Ninth Circuit was misled into a discussion of drug impairment. That issue is raised by those philosophically opposed to drug testing as a means of diverting attention away from the fact that use of a prohibited substance has been detected⁵.

Not even opponents of drug testing, however, deny that current forensic procedures, such as those required by the

⁵ Many opponents of drug testing have even suggested that drug tests are a subterfuge to criminal law enforcement. See Wisotsky, *The Ideology of Drug Testing*, 11 NOVA L. Rev. 763, 764. Yet *Amici* are unaware of any drug testing program in the school or employment setting which provides for test results to be forwarded to the criminal prosecuting authority. On the contrary, most regulations, statutes and employer programs specifically prohibit such action. See, Mandatory Federal Guidelines for Federal Workplace Drug Testing Programs, DHHS, 53 Fed. Reg. 11986; Minnesota Ch. 388 L, 1987, §181.954 (4).

Mandatory Federal Guidelines (53 Fed. Reg. 11970-11989) and the instant FRA Regulations, are sufficiently accurate and sensitive to detect the ingestion of prohibited substances at some recent prior time (McBay, *Urine Testing For Marijuana Use*, 249 J.A.M.A. 881 (1983); Dubowski, *Drug -use Testing: Scientific Perspectives*, 11 Nova L. Rev. 415, 509, 548-549 (Winter 1987); See also, Boone, *Reliability of Urine Drug Testing*, Q and A, 258 J.A.M.A. 2587 (1987). It is also universally acknowledged that the technology of screening for drugs in urine has greatly improved in recent years. (Council Report, *Scientific Issues In Drug Testing*, 257 J.A.M.A. 3110 June 1987). "The goal of urine drug testing may be stated as the reliable demonstration of the presence, or absence, of specified drugs or metabolites in the specimen-that is, the production of a valid positive or negative result." Blanke, "Accuracy In Urinalysis," NIDA Research Monograph 73 (1986); DHHS Publication Number (ADM) 87-1481.

A clear understanding of drug testing requires comprehension of the relevant laboratory procedures, the results and the probative value of those results.

a. Laboratory Procedures

Basically, urine ⁶ can be analyzed by a number of methods, including immunoassays, thin-layer chromatography, gas chromatography, high performance liquid chromatography and gas chromatography/mass spectrometry (GC/MS). Introduction to Forensic Toxicology, Cravey and Baselt, eds., Biomedical Pub. (1981). The laboratory procedures used to analyze urine for drugs are divided into two phases: screening tests and confirmatory tests.

The most widely accepted technique used to screen urine for drugs are immunoassays. These techniques are based on the ability to produce antibodies to various drugs. (Council Report, *Scientific Issues in Drug Testing*, 257 J.A.M.A. 3110, 3112 (June 1987) hereinafter cited as "Council Report"). Immunoassays are based on the principle of competition between the labelled and unlabeled drug for

⁶ Drugs are eliminated from the body through metabolism and excretion as either unchanged drug or as metabolites (a compound produced from chemical changes of a drug in the body) through urine, bile, sweat, saliva and expired air. In general, drug in the urine is more concentrated than other bodily fluids such as plasma. See, Chiang, *Implications of Drug Levels in Body Fluids: Basic Concepts*, 73 NIDA Research Monograph 62, 69-71 (1986).

binding sites on a specific antibody. (Hawks, *Analytical Methodology*, 73 NIDA RESEARCH MONOGRAPH 30 (1986) hereinafter cited as "Hawks"). Antibodies are protein substances with sites on their surfaces to which specific drugs or drug metabolites will bind. The two most commonly employed immunoassay techniques are the "Radioimmunoassay" and the "Enzyme-multiplied immunoassay technique" ("EMIT"). Council Report, at 3112.

Radiommmunoassay is based on the principle that a drug labelled with a radioactive substance competes for the antibody binding site with the same drug not labelled with a radioactive substance. The more unlabeled drug there is in the sample, the less radioactive drug binds to the antibody. Council Report, at 3112. Known amounts of radioactive-labelled drug are added to a urine sample with known amounts of antibodies. The mixture is allowed to incubate during which time the labelled drug and unlabeled drug compete for binding sites on the antibody. A gamma counter is then used and the presence or absence of a drug is indicated by the amount of radioactivity found. A positive specimen is identified when the radioactive

count is equal to or greater than those of a positive control prepared in the same manner as that of the unknown urine. Hawks, at 30-31.

EMIT is used more commonly than the RIA technique. In the EMIT assay, the label on the antigen (drug) is an enzyme (protein) that produces a chemical reaction for detection of drugs. This detection is based on the competition between unlabeled drug or drug metabolite and labelled drug or drug metabolite for binding sites on the antibody. The drug in the subject's urine competes for the limited number of antibody binding sites and thereby proportionally increases the total enzyme activity. The enzymatic activity is, therefore, directly related to the concentration of the drug present in the urine. Hawks, at 31.

It is generally agreed that all specimens screened "positive" must be confirmed by some scientific method other than that used to screen. See, Hawks, at 30; Council Report, at 3113; Boone, *Reliability of Urine Drug Testing*: Q and A, 258 J.A.M.A. 2587; Hoyt, *Drug testing In the Workplace - Are Methods Legally Defensible?* 258 J.A.M.A. 504 (1987) hereinafter cited as "Hoyt". The consensus confirmatory

method is through chromatography. Hoyt, at 509. Chromatography is a method of analysis in which the various compounds in a biological specimen can be separated by a partitioning process. This process requires, (1) a stationary phase, which may be a solid or a liquid on an inert support having a large surface area and (2) a mobile phase of liquid or gas. Substances are carried by the mobile phase through a column or across a plate, where the stationary phase interacts with the specimen to cause a separation of the various components. After separation, a detection method distinguishes the components for identification and measurement. Separation of the components of the specimen mixture containing substances of various molecular types is based on the time spent by each component in each phase (stationary and mobile) of the chromatographic system. Hawks, at 32.

Several chromatographic techniques exist including thin-layer chromatography (TLC) gas-liquid chromatography (GLC) and high-pressure liquid chromatography (HPLC). It is generally agreed among forensic scientists however that the combination of GLC with the detector, mass spectrometry

(MS) is the most specific and sensitive method available. Hoyt, at 507.

Gas chromatography/mass spectrometry (GC/MS) combines the chemical separating power of the gas chromatograph with the molecular identifying power of the mass spectrometer. The gas chromatograph separates the compound and the mass spectrometer breaks it down into electrically charged ion fragments. "Different compounds break down into different fragment patterns and, like fingerprints, no two fragment patterns are alike." Council Report at 3113; Hawks, at 35.

b. The Procedure Results

It is generally agreed among forensic toxicologists that a specimen screened positive by an immunoassay technique and confirmed positive by GC/MS provides presumptive evidence of recent past use. Hawks, at 36; Manno, *Interpretation of Urinalysis Results* 73 NIDA Research Monograph 54 (1986); Ellis, *Excretion Patterns of Chronic Cannabinoid Users*, 38 Clin. Pharm. & Ther. 572 (November 1 985); McBay, *Urine Testing for Marijuana Use*, 249 J.A.M.A. 881; Dubowski, at

548-549; Introduction to Forensic Toxicology, Cravey and Baselt, eds. (Biomedical Publications California 1981, hereinafter cited as "Cravey".) How those results shall be used by employers or in a court proceeding are a concern to the forensic scientist only to the point of explaining the manner in which the tests results were reached. Cravey, at 152 So long as the forensic scientist can establish that the methods and procedures employed in adducing the result were performed and followed in accordance with the generally accepted standards of the discipline in question, the test results should be allowed as evidence. (Fed. R. Ed. 401, 402, 702.)

What the Ninth Circuit failed to recognize is that there exists unanimity among forensic scientists, including those philosophically opposed to drug testing employees, (McBay, *Drug Analysis Technology--Pitfalls and Problems* 33 Clin Chem. 33 B-39b (1987)) that immunoassay results, confirmed by another more sensitive scientific method is accurate and reliable in detecting drug use. The FRA regulations in issue here require immunoassay screening, confirmed by another more sensitive scientific method. Contrary to the Ninth

Circuit's conclusion, such methods are reliable. See *Rushton v. Nebraska Public Power District*, 653 F. Supp 1510 (D. Neb. 1987), aff'd 3 IER Cases (BNA) 257 (8th Cir. April 14, 1988); *National Treasury Workers Union v. Von Raab*, 816 F. 2d, 170 (5th Cir 1987), cert granted 108 S. Ct. 1072 (1988).

II. THE FRA REGULATORY SCHEME IS LEGALLY DEFENSIBLE

Defensibility of a drug testing program depends not only upon the reliability of the analytic procedure utilized but compliance with several other factors including demonstration of employer need for drug testing, adoption by the employer of a comprehensive program which includes rehabilitation, notice of testing provided to applicants and employees, adoption of written policy and procedures, adoption of proper chain-of-custody procedures, proper written record keeping procedures, laboratory quality assurance and quality control programs, retention and use of qualified laboratory personnel, adoption and compliance with confidentiality procedures and

result reporting requirements and retention of specimens to permit independent testing.

1. The employer must establish a need for an anti-drug program:

In *Caruso v. Ward* 131 N.Y. Ad. 2d 214, 520 N.Y.S. 2d 551 (AD 1, Dept. 1987), the court held that police officers could not be randomly tested for drugs without some overriding governmental interest. Such interest did not exist where there was no showing of a drug problem among the police officers to be tested, and where there were statistics showing that few police officers had tested positive for drugs in the past. But see, *Policeman's Benevolent Association of New Jersey, Local 318 v. Township of Washington*, 3 IER Cases BNA 699 (3d Cir. 1988). *Amici* submit that in the instant case a need for drug testing railroad employees has been established. See *Burnley v. R.L.E.A.*, Petition for Writ of Certiorari (87-1555) from the U.S. Court of Appeals for the Ninth Circuit No. 87-1555, March 1988 at 2-4). See also, *Division 241 A.T.U. v. Suscy*, 538 F2d 1264, 1267, (7th Cir.), cert denied, 429 U.S. 1029 (1976).

A need for an anti-drug program can be established by statistics such as those regarding drug related accidents and employee theft, health, disability, or by public safety concerns found in individual work settings. In this case, such needs are not hard to document. Opinion polls of employees show that they recognize the need for drug testing. USA Today Survey, (March 1986). A general opinion poll conducted by the Gallop Organization indicated that most Americans favor testing all employees for drug use. *Down on Drugs: A Newsweek Poll*, Newsweek, August 11, 1986 p. 16. Another poll found that 69 percent of the employee-respondents favored periodic drug testing by their company, and 81 percent were willing to take a drug test even if they could refuse. Lamar, *Rolling Out the Big Guns: The First Couple and Congress Press the Attack on Drugs*, Time, September 22, 1986, p. 26; *Most Favor Mandatory Testing, Poll Concludes*, The Davis Enterprise, September 15, 1986, p. 2.

As the above polls indicate, employees realize that a co-worker's drug use can pose a serious problem to workplace

safety and productivity. Drug use threatens the viability of their companies and, thus, ultimately threatens their jobs.

Even some legal commentators who are generally not in favor of drug testing concede that public safety concerns may establish a need for, or at least legitimize, drug testing. Comment, *Constitutional Law: Urinalysis and the Public Employer - Another Well Delineated Exception to the Warrant Requirement?* 30 Okla. L. Rev. 257, 171-72 (1986); Higginbotham, F.B.I. L. Enf. Bull, at 25, 28; Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 Employee Rel. L. J. 422, 423 (1985):

2. The employer should have a comprehensive anti-drug program which includes rehabilitation:

In *Shoemaker v. Handel*, 795 F. 2d, 1136 (3 Cir. 1986) cert denied, 107 S. Ct. 577 (1986), the lower federal court upheld the New Jersey Racing Commission's drug testing program for jockeys, in part, because rehabilitation was offered to jockeys who test positive for drugs. Various proposed or enacted state statutes, and President Reagan's 1986 Executive Order "Drug Free Federal Workplace", provide some form of substance abuse evaluation or

rehabilitation as an alternative to serious discipline if an employee tests positive. Executive Order, No. 12,564, 51 Fed. Reg. 32889 at 32889. As examples of current state laws see, Iowa, Sec. 7305, HF 469, L. 1987, effective July 1, 1987; Minnesota, Paragraphs 181. 950-957, effective September 1, 1987; Utah, Utah Code Annotated, Sec. 34-38-1, effective 1987; Vermont, Vermont Annotated T-21 Sec. 511, effective September 1987; for pending bills see, Maine, Bill L.D. 156; California, Senate Bill No. 1611; New Jersey, Assembly Bill 2850.

Rehabilitation may begin with the referral of an employee to an evaluation and treatment program initiated through a company employee assistance program (EAP). Evans, *Drug Testing, Work performance, and EAPs: Recent Legal Guidelines*, The Almacan, (December 1986) at 33. Although rehabilitation is desirable, it must be noted that a positive drug test result does not, *per se*, prove that the employee is an addict, and thus handicapped. The test shows drug use, not addiction. Current drug users are not entitled to handicapped protection. 29 USC Sec. 706 (7) (B); 29 USC 793 and 794.

McCleod v. City of Detroit, 39 FEP Cases 225 (ED. Mich. 1985); *Heron v. McGuire* 42 FEP Cases 31 (2d Cir. 1986); *Copeland v. Philadelphia Police Dept.* No. 87-1256 (3rd Cir. March 7, 1988). The Federal Railroad Administration regulations provide an opportunity for evaluation and counseling. 49 CFR 219.401.

3. The employer should provide employees with proper notice, in the form of a written policy, prior to the implementation of a drug testing program:

This guideline was affirmed in the case of *Capua v. City of Plainfield*, (643 F. Supp. 1507 D.N.J. 1986) where city officials conducted a surprise drug test on firefighters and police. The court held that before a drug testing program is implemented, its existence must be made known, its methods clearly enunciated, and its procedural and confidentiality safeguards adequately provided for. See also *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Feliciano v. City of Cleveland*, 661 F.Supp. 578 (N.D. Ohio 1987). Employees who may be required by an employer to submit to a drug test should be provided a written policy statement which contains:

- (a) A general statement of the employer's policy on employee drug use which will include identifying both the grounds on which an employee may be required to submit to a drug test and the actions the employer may take against an employee on the basis of a positive confirmed drug test result or other violation of the employer's drug use policy (see, 49 CFR 219.201 and 219.301);
- (b) A general statement concerning confidentiality; 49 CFR 214.403 (b) (2); 53 Fed. Reg. 11986.
- (c) Procedures for how employees can confidentially report the use of prescription or non-prescription medications prior to being tested; 49 CFR 219.309 (b) (2); 53 Fed. Reg. 11985-6;
- (d) Circumstances under which drug testing may occur and a description of employment positions which will be subject to testing on a reasonable suspicion, random, or other basis. (see, 49 CFR 219.201 and 219.301);
- (e) The consequences of refusing to submit to a drug test. (see, 49 CFR 219.213 and 219.505);
- (f) Information regarding opportunities for assessment and rehabilitation if an employee has a positive confirmed test result. (49 CFR 219.405)
- (g) A statement that an employee who received a positive confirmed drug test result may explain or contest the accuracy of that result, (49 CFR 219.211 and 219.503; 53 Fed. Reg. 11985).
- (h) A list of all drugs for which the employer might test. Each drug should be described by its brand name or common name, as applicable, as well as its chemical name. (see, 49 CFR 219.101, 219.501(c) and 219.501, and 53 Fed. Reg. 11980.);
- (i) A statement regarding any applicable collective bargaining agreement or contract.

An employer should post the notice in an appropriate and conspicuous location on the employer's premises and copies

of the policy should be available for inspection by employees during regular business hours.

An employer who conducts job applicant drug testing should notify the applicant, in writing, upon application and prior to the collection of the specimen, that the applicant may be tested for the presence of drugs or their metabolites. (See, 49 CFR 219.501 (b)).

4. The employer should have written specimen collection procedures that preserve the probative value of the specimen:

FRA Regulations (49 CFR 219) and applicable Mandatory Federal Guidelines (53 Fed. Reg. 11979) meet this standard. They provide that specimen collection will be documented with procedures including the labeling of specimen containers to reasonably preclude the likelihood of erroneous identification of test results. Specimen collection, storage, and transportation to the testing site should be in a manner which reasonably precludes specimen contamination or adulteration.

49 CFR 219.204, 219.205, 219.305; and 53 Fed. Reg 11980, 11987. See also, Imwinkelried, The Methods of Attacking Scientific Evidence (Charlottesville, VA: The Michie Co. 1982) at 83, 89-90; Imwinkelried, *The Identification of Original Real Evidence*, 61 Mil. L. Rev. 145 at 159.

5. The employer and laboratory should keep records which include: chain of custody, operation and maintenance documents, records of procedures, worksheets regarding equipment operation, and quality control:

Proper record keeping ensures the probative value of a drug test result, (*United States v. Ford*, 23 MJ 331 (CMA 1987)); *United States v. Hagan* 24 MJ 571 (NMCMR 1987); *Brown v. Smith*, 505 NYS 2d 743 (Sup. 1985) and it ensures that the laboratory performs tests in a non-negligent manner. *Dornak v. Lafayette General Hospital*, 399 So. 2d 268 (La.1981); *Bulkin v. Western Kraft East, Inc.*, 422 F. Supp. 437 (E.D. Pa, 1976); and see, 49 CFR 219.205, 219.307, 219.19, 2219.21; 53 Fed. Reg. 11980-11982, 11987; For an example of State law requirements, see Illinois Clinical Laboratory Act, Ill. Rev. Stats., ch. 111 1/2, par. 626-101 et seq.

6. Qualified laboratory personnel who are properly trained:

The FRA Regulations (49 CFR 219.307) require that all railroads testing employees must ensure that testing is undertaken only by an independent laboratory "proficient in the testing of urine for alcohol and drugs of abuse". Moreover, the laboratory employed by any railroad "shall regularly participate in an external quality control program that involves the analysis of samples submitted by a reference laboratory..." 49CFR 219.307.

Since the Ninth Circuit decision in this case on February 11, 1988, the final, "Mandatory Guidelines for Federal Workplace Drug Testing Programs" were issued. (53 Fed. Reg. 11970-11989, issued April 11, 1988). The Mandatory Guidelines require all laboratories testing covered employees to employ a qualified individual with documented scientific qualifications in analytical forensic toxicology who will assume professional, organizational, educational and administrative responsibility for the laboratory. Minimum educational and experience qualifications are set forth. (53 Fed Reg 11982). Many states also mandate strict education and experience guidelines for qualified laboratory directors and staff as a condition of initial licensing and renewal. (See, Illinois Clinical Laboratory Act, Ch. 111 1/2, par. 626 - 101; see, also CAP guidelines for forensic urine drug testing ("FUDT") laboratory accreditation program, discussed at pp. 1-2, 25-28, brief of *Amicus Curiae*, CAP, now before this

Court in *National Treasury Workers Union v. Von Raab*. 816 F.2d 170 (5th Cir. 1987) stay denied 107 S. Ct. 2479 (1987); cert granted 56 USLW 3590 (Feb. 29, 1988) (No. 86-1879).

7. Laboratory participation in accreditation, quality control, and proficiency testing programs:

The Ninth Circuit cited Professor Kurt M. Dubowski's extensive scientific discussion of drug testing (11 Nova L. Rev. 415 (1987)) in support of its finding that blood and urine tests are not reasonably related to the stated purpose of the tests. (839 F. 2d 588) One of Professor Dubowski's recommendations was that a comprehensive and universal nationwide system of regulation of non-medical drug-use testing should be established forthwith, preferably in the form of federal licensure with provisions for alternative accreditation under standards identical to those for federal licensure. Since the publication of Professor Dubowski's recommendation in 1987, the NIDA certification program (53 Fed Reg 11970-11989) and CAP accreditation program have begun. 49 CFR 219.307. Also, many state laboratory licensure requirements, such as those found under the Illinois Clinical Laboratory Act , (Ill. Rev. Stats., ch. 111 1/2 , par. 628-101 et seq.) provide

stringent controls covering such areas as capacity to test the commonly preferred classes of drugs, initial and confirmatory tests, personnel qualifications, quality assurance and quality control, security procedures and chain-of-custody requirements. In addition, they may cover specimen accession and storage , documentation, result reporting, confidentiality, and written standard operating procedures, as well as written daily and periodic preventative maintenance procedures and analytical balance certification procedures. As a practical business matter, any laboratory not participating in either NIDA or CAP programs will be driven from the competitive market. Furthermore, any laboratory not maintaining compliance with state licensing requirements will be subject to revocation proceedings. See, Illinois Clinical Laboratory Act, sec 8-101.(Ill. Rev. Stat. Ch. 111 1/2, par. 628-101.).

8. The employer and laboratory must have strict confidentiality and reporting procedures:

All information, interviews, reports, statements, memoranda, and test results, written or otherwise, received by

the employer through its drug testing program should be considered confidential communications. See 49 CFR 219.11 (c)(2); 219.403(b)(2); 219.403 (c)(1); 219.209; 219.307(c); and 53 Fed. Reg. 11987. Strict confidentiality procedures not only protect employees, they protect employers. *Houston Belt and Terminal Rigging Co. v. Wherry*, 548 S. W. 2d 743 (Tex. Civ. App. 1977) cert denied 434 U.S. 962 (1977). Although employers may have a qualified privilege to release accurate, although derogatory, information about an employee to persons who have a need to know the information, this privilege may be lost if it is released with malice, recklessness, or if the scope of the privilege is exceeded. *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P. 2d 1106 (Kan. 1986); *O'Brien v. Papa Gino's of America, Inc.* 780 F2d 1067 (1st Cir. 1986).

9. The laboratory should disclose to the employer a written test result within five working days:

All laboratory reports of a test result should, at a minimum, state;

- (a) The name and address of the laboratory that performed the test and the positive identification of the

person tested. *Rodriguez v. Pennsylvania Board of Probation and Parole* 516 A2d 116, (Pa. Commonwealth, 1986), *Jones v. Pennsylvania Board of Probation and Parole* 520 A2d 1258 (Pa. Commonwealth 1987); 49 CFR 219.307 (c);

- (b) any positive confirmed drug test results of a specimen which screened positive on an initial test, or a negative drug test result on a specimen.
- (c) A list of the drugs tested;
- (d) The type of tests conducted for both initial and confirmation tests and the cut-off levels of the tests;
- (e) The report shall not disclose the presence or absence of any physical or mental condition or of any drug other than the specific drug and its metabolites that an employer requests to be identified. 29 USC 701 et seq.

10. Maintenance of specimens for confirmation or re-test:

Both the NIDA certification program and the CAP accreditation program specify specimen maintenance requirements. 49 CFR 219.211(d); 219.303(a)(5); 219.307(a)(2); 219.305(d); 53 Fed. Reg. 11983. The laboratory industry is increasingly aware of the potential litigation problems resulting from failure to store specimens whose results could be subjected to challenge. See, *Franklin v. Office of Court Administration*, 2 IER Cases (BNA) 783 (NY S Ct. 1987), (where applicant was denied the position of court officer following a positive drug test; court ordered re-examination of application without the drug test results after

applicant was denied opportunity to have the specimen independently tested prior to its being destroyed).

11. Analysis of specimens by a reliable scientific method:

Amici's position with regard to this requirement of a legally defensible drug program has been adequately discussed in Section I of this brief.

12. Opportunity for employee to challenge the test results:

Due Process:

Employees generally enjoy rights entitling them to due process protection when faced with discharge or discipline. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951). These rights may derive from the right to contract, to engage in the common occupations of life, and maintain one's employment and standing in the community. *Bishop v Wood*, 426 U.S. 341 (1976). *Board of Regents v. Roth*, 408 U.S. 593 (1972); *Paul v. Davis*, 424 U.S. 693, 701-712 (1976). Public employees may have a property interest in continued employment if they can establish a legitimate claim of entitlement. *Board of Regents v. Roth*, at 576-77; See also, *Perry v. Sindermann*, 408 US 593 (1972). Employee due process rights can also be established by statute

or contract. *Slochower v. Board of Education*, 350 U.S. 551 (1956). The right to due process applies in public employee drug testing matters. *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (ED. Tenn. 1986), aff'd 3 IER Cases (BNA) 673 (6th Cir. May 23, 1988); *Everett v. Napper*, 833 F 1507 (11th cir 1987); *Shoemaker v. Handel*, 795 F2d 1136 (3rd Cir. 1986) cert denied, 107 S. Ct. 577 (1986); *Hester v. City of Milledgeville*, 598 F. Supp. 1456 (MD. Ga. 1984).

The basic due process requirements that apply in drug testing are; 1) notice of drug testing prior to implementation of the testing program; 2) test accuracy including having an initial test confirmed by a method of greater or equal sensitivity; 3) an opportunity for the employee who tests positive to have a hearing or other chance to contest the test results. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

If an employee tests positive, the following measures should be taken:

- a) Every specimen that produces a positive confirmed result should be preserved in a frozen state by the laboratory that conducts the confirmation test for a period of time after the result is mailed or otherwise

delivered to the employer. During this period, the employee who has provided the specimen, should be permitted by the employer to have a portion of the specimen re-tested, at the employee's expense. (49 CFR 219.305; 53 Fed. Reg. 11983).

b) An employee should be able to request and receive a copy of the test result report. After receiving notice of a positive confirmed test result, the employee should be able to submit information at a hearing to explain or to contest the results. 49 CFR 219.211, 219.503, 219.305;

Courts have largely upheld the accuracy of drug test results arising from programs which, like the instant FRA Regulations, comply with these twelve criteria. *Peranzo v. Coughlin*, 675 F. Supp. 102 (S.D. N.Y. 1987), *Vasquez v. Coughlin*, 118 N.Y.A.D. 2d 897, 499 N.Y.S. 2d 461 (A.D. 3 Dept, March 6, 1986), *N.T.E.U. v. Von Raab*, 816 F2d 170 (5th Cir. 1987), stay denied 107 S. Ct. 2479 (1987), cert. granted 56 U.S.L.W. 3590, February 29, 1988; *Lahey v. Kelly* 71 N.Y. 2d 135, 518 NE 2d 924, 524 N.Y.S. 2d 30 (Ct. App. 1987).

III. POSITIVE DRUG TEST RESULTS FROM A LEGALLY DEFENSIBLE PROGRAM POSE AN UNACCEPTABLE RISK TO A COMMON CARRIER

Generally, employers have a right and duty to provide employees with a safe work environment.⁷ Common carriers, such as those governed by the FRA Regulations are bound by a "special duty" to protect passengers against unreasonable risk of physical harm. 2 Restatement of Torts 2d, Sec. 314A (1) (a).

Any positive drug test of an employee covered by FRA Regulations possesses an unacceptable risk to the common carrier employer. While impairment levels of drug use cannot now be predicted, no responsible scientist can deny that illicit drug use affects behavior. Chiang, *Implications of Drug Levels in Body Fluids: Basic Concepts*, 73 NIDA Research Monographs 62, 63 (1986), where the authors indicate that their studies show "most abused drugs act on the central

⁷ For a general discussion of the rights and duties arising from the employment relationship see, Rothstein, *Medical Screening of Workers*, 81 (BNA Books 1984), where the author, at 71, suggests that a duty to screen employees for intoxicants cannot be questioned.

nervous system and produce effects on mood, perception, behavior and performance", citing, Goodman and Gilman, Pharmacological Basis of Therapeutics, (New York: McMillan & Co. (1985)); see also, Soderstrom, *Marijuana and Alcohol Among 1023 Trauma Patients*, 123 Arch. Surg. 733-737 (June 1988) (where the study showed that 34.7% of subjects tested had used marijuana); Mason and McBay, *Cannabis: Pharmacology and Interpretation of Effects*, 30 J. of Forensic Science, 615 (July 1985) (where the authors agree that perceptual, cognitive, affective and behavioral changes are produced when cannabis is ingested, but they deny that detection of impairment levels is possible); 52 NIDA Research Monograph at 102-103, 118-119, 127, 137, 142, 146 (1984)

Because forensic scientific methods can reliably detect use and because the common carrier employer is entitled to take reasonable steps to limit liability, requiring employees involved in serious or fatal accidents or those suspected of drug use to submit to urinalysis is patently reasonable.⁸ See,

⁸ It must be noted that, although the Ninth Circuit stated that drug testing, combined with suspicion of drug use, "should withstand scrutiny" under the fourth amendment, "subpart D" of the FRA Regulations (49 CFR §219.301, "Testing for a

Jones v. McKenzie, 833 F.2d 335 (D.C. Cir 1987). The Ninth Circuit's conclusion that drug testing was not reasonable must, therefore, be reversed.

IV CONCLUSION

Forensic scientific methods, properly employed in an otherwise legally defensible substance abuse program, are accurate and reliable. The Ninth Circuit committed reversible error when it allowed itself to become aligned with those philosophically opposed to drug testing and who ignore what drug tests can do. A determination that drug testing is unconstitutional because toxicological methods cannot determine levels of intoxication or impairment begs the question: when employee drug use is detected, what may an employer with a special duty of care do to limit his liability? Undoubtedly, drug testing is a reasonable employer response to the risks posed by employee drug use.

Those who condemn the science of drug testing because, they disagree with the manner in which individuals are selected

reasonable cause") was found to be unreasonable. 839 F. 2d 589.

or disciplined may be compared to those of ancient times who found it appropriate to "kill the bearer of bad tidings." We urge this Court allow "the messenger" to live.

For the reasons set forth herein, *Amici* respectfully requests that this Court to resolve this matter in favor of Petitioner, James H. Burnley, IV, Secretary of the Department of Transportation, and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

William J. Judge*
431 South Dearborn
Chicago, IL 60605
(312)-939-7709

David G. Evans
35 Cold Soil Road
Lawrenceville, NJ 08648
(609)-896-3923

Michael M. Judge
2325 Carpenter, Suite 1
Des Moines, IA 50311
(515)-277-2774

July 28, 1988

*Counsel of Record

(17)

No. 87-1555

Supreme Court, U.S.

FILED

SEP 9 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR THE
AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

TABLE OF CONTENTS

	Page
ARGUMENT	1
Introduction and Summary	1
I. Subpart C Of The FRA Regulations Mandates Searches Which Are Constitutionally Unreason- able	6
II. Subpart D Of The FRA's Regulations Exceeds The FRA's Authority Under The Federal Rail- road Safety Act	19
CONCLUSION	29

TABLE OF AUTHORITIES

CASES:	Page
Almeida-Sanchez v. United States, 413 U.S. 266 (1973)	7, 15
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	19
California v. Ciraolo, 476 U.S. 207 (1986)	11
California v. Greenwood, — U.S. —, 55 L.W. 4409 (May 16, 1988)	11
California v. Taylor, 353 U.S. 553 (1957)	23
Connick v. Meyers, 461 U.S. 138 (1983)	12
Cupp v. Murphy, 412 U.S. 291 (1973)	10
Delaware v. Prouse, 440 U.S. 648 (1979)	9
Detroit Police Officers Assn. v. Detroit, No. 88-7118 (E.D. Mich., June 14, 1988)	3
Donovan v. Dewey, 452 U.S. 594 (1981)	14
Dow Chemical Co. v. United States, 476 U.S. 227 (1986)	11
Fort Halifax Packing Co. v. Coyne, — U.S. —, 55 L.W. 4699 (June 1, 1987)	23
Government Employees Council 33 v. Meese, No. C-88-1419 SAW (N.D. Cal. June 16, 1988) (Bureau of Prisons)	3
Griffin v. Wisconsin, — U.S. —, 55 L.W. 5156 (June 23, 1987)	8
Guiney v. Rouche, — F. Supp. —, 3 BNA Ind. Empl. Rights. 598 (D. Mass., May 23, 1988)	3
Harmon v. Meese, No. 88-1766 (D.D.C., July 29, 1988)	3, 4
Local 3, Policemen Benevolent Ass'n v. Township, — F.2d —, 3 BNA Ind. Empl. Rights 699 (3rd Cir., June 21, 1988)	3
Lovorn v. Chattanooga, 846 F.2d 1539 (6th Cir., 1988)	3
Maryland v. Macon, 472 U.S. 463 (1985)	11
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	23
Michigan v. Clifford, 464 U.S. 287 (1984)	16-18
Michigan v. Tyler, 436 U.S. 499 (1978)	16-18
New Jersey v. T.L.O., 469 U.S. 325 (1985)	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	Page
New York v. Burger, — U.S. —, 55 L.W. 4890 (June 19, 1987)	13-14
New York v. Class, 475 U.S. 106 (1986)	11
O'Connor v. Ortega, — U.S. —, 55 L.W. 4406 (March 31, 1987)	8, 11, 12
Policemen's Benevolent Assn. v. Township, 672 F. Supp. 779 (D.N.J. 1987), <i>rev'd</i> , — F.2d —, 3 BNA Ind. Empl. Rights. 699 (3rd Cir., June 21, 1988)	2
Quadros v. Reagan, No. C-88-1764-RHS (N.D. Cal., August 22, 1988)	3
Railroad Trainmen v. Terminal Co., 394 U.S. 369 (1969)	21-22
Rushton v. Nebraska Public Power Dist., 844 F.2d 562 (8th Cir. 1988)	3
Schmerber v. California, 384 U.S. 757 (1966)	9, 10
Shore Line v. Transportation Union, 396 U.S. 142 (1969)	22
Smith v. Maryland, 442 U.S. 463 (1985)	11
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960)	22
Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330 (1960)	21
Terminal Assn. v. Trainmen 311 U.S. 1 (1943)	23
United States v. Biswell, 406 U.S. 311 (1972)	14
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	8
United States v. Miller, 425 U.S. 435 (1976)	11
Watt v. Alaska, 451 U.S. 259 (1981)	24
Winston v. Lee, 470 U.S. 753 (1985)	8, 9

STATUTES AND REGULATIONS:

Executive Order No. 12564	3
Federal Railroad Safety Act, 45 U.S.C. §§ 202 <i>et seq.</i>	19-29
Hours of Service Act, 45 U.S.C. §§ 61 <i>et seq.</i>	3
Railway Labor Act, 45 U.S.C. §§ 151 <i>et seq.</i>	19-29
45 C.F.R. § 219	<i>passim</i>

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS:	Page
Hearings on Federal Standards for Railroad Safety, House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968)	25-26
Hearings on Federal Railroad Safety Act of 1969, Subcommittee on Surface Transportation, Senate Committee on Commerce, 91st Cong., 1st Sess. (1969)	26
Hearings on Railroad Safety and Hazardous Materials Control, Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970)	27
H.R. 16890, 90th Cong., 2d Sess. (1968)	25
S. 1933, 91st Cong., 1st Sess. (1968)	26
S. 3061, 90th Cong., 2d Sess. (1968)	27
H.R. Rep. 91-1194, 91st Cong., 2d Sess. (1970)	20, 26, 27
S. Rep. 91-619, 91st Cong., 1st Sess. (1969)	24-25, 26, 27-28
50 Fed. Reg. (1985)	3, 15, 16, 20-21
53 Fed. Reg. (May 10, 1988)	3
115 Cong. Rec. (1969)	26
116 Cong. Rec. (1970)	28
MISCELLANEOUS:	
Federal Railroad Administration Alcohol and Drug Field Manual, Unit D	9
Cox, <i>Recent Development in Federal Labor Law Preemption</i> , 41 Ohio St. L.J. 277 (1980)	23
Fried, <i>Privacy</i> , 77 Yale L.J. 475 (1968)	9
<i>Washington Post</i> , April 27, 1988	4
<i>Washington Post</i> , May 5, 1988	4
<i>Washington Post</i> , July 7, 1988	4
<i>Washington Post</i> , July 29, 1988	5
24 President Documents 774	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

 No. 87-1555

JAMES H. BURNLEY, IV, SECRETARY,
 DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
 Court of Appeals for the Ninth Circuit

BRIEF FOR THE
 AMERICAN FEDERATION OF LABOR AND
 CONGRESS OF INDUSTRIAL ORGANIZATIONS
 AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions representing approximately 13,000,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

ARGUMENT

Introduction and Summary

In the brief *amici curiae* the AFL-CIO, *et al.*, submitted in *Treasury Employees v. von Raab*, No. 86-1879—the case scheduled to be heard in tandem with the instant case—we began by observing that *von Raab* “provides a distorting prism through which to consider” the

questions posed by the run of cases challenging drug testing requirements. AFL-CIO Br. in No. 86-1879 at 3. That observation applies with even greater force in the instant case.

At issue here are regulations promulgated by the Federal Railroad Administration ("FRA") requiring railroads to conduct drug testing following certain types of train accidents and "authorizing" railroads to test under other defined circumstances (such as following certain rule violations). As in *von Raab*, the testing program here applies to all employees falling within a narrowly defined cohort. And, as in *von Raab*, the Solicitor General is able to proffer carefully-tailored and quite limited justifications for the program.

In the final analysis, however, the Government's defense of these programs rests on the proposition that while subjecting individuals to blood and urine tests for drugs may cause "some inconvenience," Pet. Br. at 35, such "modest toxicological test[s]," *id.* at 30 n.30, "entail a minimal intrusion on employees' expectation of privacy," *id.* at 25. That proposition, if sustained, could be used to justify virtually *any* drug testing program no matter how far-ranging, and not just the more limited programs before the Court. It is thus essential, in our view, at the very outset for the Court to be informed about what is going on in the world of drug testing.

As public concern over drug use in the society has risen, broadscale, random testing has become very much the order of the day. These random drug testing programs lie at the "heart and soul" of the wave of constitutional litigation in the lower courts. *Policemen's Benevolent Assn. v. Township*, 672 F. Supp. 779, 785 (D.N.J. 1987), *rev'd*, — F.2d —, 3 BNA Ind. Empl. Rights. 699 (3d Cir., June 21, 1988).¹

¹ In just the past four months, since our brief in *von Raab* was filed, seven new decisions have been reported concerning the consti-

The nature of the more-contemporary, random testing programs is perhaps best illustrated by the recently-announced program for the testing of federal employees.² Acting pursuant to Executive Order No. 12564, 51 Fed. Reg. 32889 (1987), which authorizes testing only of employees occupying "sensitive" positions, the cabinet agencies and large non-cabinet agencies—the "Tier I" agencies for purposes of the drug testing program—have decided to subject to random testing 345,528 federal employees, roughly 17% of the workforce employed by these

tutionality of random drug testing. The plan of several agencies of the Federal Government to commence random drug testing, which we discuss in text *infra* at pp. 3-5, has been enjoined by three district courts. *Harmon v. Meese*, No. 88-1766 (D.D.C., July 29, 1988) (Justice Department); *Government Employees Council 33 v. Meese*, No. C-88-1419 SAW (N.D. Cal. June 16, 1988) (Bureau of Prisons); *Quadros v. Reagan*, No. C-88-1764-RHS (N.D. Cal., August 22, 1988).

In addition, one appellate court and two district courts have invalidated random drug testing programs initiated by local governments. See *Lovorn v. Chattanooga*, 846 F.2d 1539 (6th Cir. May 23, 1988); *Guiney v. Rouche*, — F. Supp. —, 3 BNA Ind. Empl. Rights, 598 (D.Mass., May 23, 1988) (Keeton, J.); *Detroit Police Officers Assn. v. Detroit*, No. 88-7118 (E.D. Mich., June 14, 1988). Two courts of appeals have reached contrary conclusions. *Ruston v. Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988); *Local 3, Policemen Benevolent Ass'n v. Township*, — F.2d —, 3 BNA Ind. Empl. Rights 699 (3d Cir., June 21, 1988).

² Indicative of the change in the times is the fact that just three years after the FRA promulgated the regulations at issue in this case, and even though, by its own admission, the drug testing that has been done under those regulations has revealed a level of drug use "below many previous estimates . . . notwithstanding the fact that drug users would be expected to be overrepresented in the population sampled (employees involved in accidents)," 53 Fed. Reg. 16641 (May 10, 1988), the FRA has recently proposed a new regulation which would mandate random drug testing of *every* railroad employee who is covered by the Hours of Service Act, 45 U.S.C. §§ 61 et seq. See 53 Fed. Reg. 16651-52 (May 10, 1988). Significantly, the FRA rejected such a requirement just three years ago. See 50 Fed. Reg. 31550 (1985) ("it does not appear to be fair to subject the majority of sober employees to testing in the absence of some reason to question their fitness").

agencies.³ The positions designated for such testing include, *e.g.*, financial analysts, financial assistants, statisticians and secretaries in the Economic Litigation Section of the Antitrust Division of the Justice Department;⁴ attorneys in the Appellate Section of the Civil Rights Division;⁵ recreation assistants and public affairs officers employed by the Interior Department;⁶ and pipe-fitters, cooks, and messmen employed by the Department of Commerce.⁷

As the scope of these random drug testing programs has expanded, the rationale that is being offered has shifted as well. Increasingly, such programs are defended not so much on employment-related grounds as on *law enforcement* grounds, *viz.*, on the ground that the workplace provides a convenient situs for detecting illegal drug use, and that employment-sanctions provided a useful means of deterring such drug use. Thus, for example, President Reagan has stated that employment-based drug testing is "an essential part of the effort" to "transform[] illegal drug users into nonusers."⁸ Former Attorney General Meese likewise advocated expansive drug testing programs in part because such program would "prevent people from disobeying the law."⁹ And Assistant Attorney General Bolton, in urging the United States District Court for the District of Columbia to dismiss a constitutional challenge to the Justice Department's plan to test randomly a sizable number of its own employees,

³ *Daily Labor Report*, May 5, 1988, p. A-8.

⁴ See *Harmon v. Meese*, No. 88-1766 (D.D.C. July 29, 1988).

⁵ *Id.*

⁶ *Washington Post*, July 7, 1988, p. A3.

⁷ *Washington Post*, May 5, 1988, p. A22.

⁸ 24 President Documents 774 (remarks to the National Conference on a Drug Free Workplace, June 9, 1988).

⁹ *Washington Post*, April 27, 1988, p. 1.

argued that "We believe the whole world is watching . . . including . . . Manuel Noriega."¹⁰

The breadth of these random testing programs and the fact that the government interest underlying those programs is quite different from the interest asserted here arguably provides a ground for distinguishing random testing from the post-accident testing required by the FRA regulations. But the threshold question raised by random testing and raised here—*viz.*, whether the testing entails only "a minimal intrusion" on employee privacy—is the same. And while, under the developed Fourth Amendment law, the Government's burden in justifying a drug testing program varies depending on the degree of the intrusion, the converse is not true: whether an intrusion is significant does not depend upon the number of employees being tested or the strength or weakness of the justification for the testing.

Thus, if the Court were to accept the Solicitor General's position on this threshold issue that would go far toward validating wide-ranging random drug testing program as constitutionally reasonable. We therefore proceed in developing our argument on the premise that this case must be approached as if the lawfulness of random testing of the type instituted by the Federal Government were hanging in the balance.

With this in mind, we turn to the specifics of the FRA regulations at issue here. In Part I we address the portion of the regulation that mandates post-accident testing; we show that because drug testing necessarily threatens *significant* privacy expectations, the FRA regulations are violative of the Fourth Amendment insofar as the regulations require testing without any reason to believe, in a particular case, that the testing will yield evidence of wrongdoing.

In Part II, we address the portion of the FRA regulation that authorizes, but does not compel, testing under

¹⁰ *Washington Post*, July 29, 1988, p. A17.

other circumstances. As we demonstrate, it is neither necessary nor appropriate for the Court to decide the distinct constitutional questions posed by governmental authorization of drug testing by private employers, because the authorization here is so clearly contrary to the Railway Labor Act as to be beyond the FRA's regulatory authority.

I. Subpart C Of The FRA Regulations Mandates Searches Which Are Constitutionally Unreasonable.

Subpart C of the FRA regulation provides in pertinent part that following an accident of the type described in the regulation, the railroad "shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident"—including "each and every operating employee assigned as a crew member" and any "dispatcher, signal maintainer, or other covered employee . . . directly and contemporaneously involved in the circumstances of the accident"—provide blood and urine samples for toxicological testing by FRA." 45 C.F.R. § 219.203(a)(1), (2). Once secured, the blood and urine must be "made available" to FRA by mailing the samples to a laboratory designated by the FRA; the laboratory then notifies the FRA and the FRA in turn "notifies the railroad and the tested employee of the result of the toxicological analysis." *Id.* §§ 219,204(c), 250(a), 206(d), 211(a).

There is no doubt, and the Solicitor General concedes, that the "post-accident testing under Subpart C . . . must be regarded as a search within the meaning of the Fourth Amendment." Pet. Br. at 24 n.26. It is equally clear, as the Solicitor General at least implicitly acknowledges, that these searches are conducted absent any "individualized suspicion" of wrongdoing by the employees being searched, Pet. Br. at 22: given the multiple causes of accidents, the fact that an accident has occurred does not provide reason to believe that any employee—let alone every crewmember and every other employee somehow involved in the "circumstances of the accident" whether

or not the employee can be said to have played any role in causing the accident—was under the influence of alcohol or drugs at the time. Thus, to defend Subpart C the FRA must bear the heavy burden of justifying these searches as falling within the very limited constitutional permission for searches *without* individualized suspicion. As we proceed to show, the FRA has failed to sustain that burden.

A. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." The central challenge posed by the Amendment is to define "reasonable" and "unreasonable" searches.

From the first it has been clear that the Amendment proscribes more than merely *gratuitous* invasions of privacy; viz., invasions unsupported by any reason. The guiding principle of the Founders is that the Government's power to initiate a search must be limited even where the Government is acting to further a legitimate end in a sensible and efficient way. Thus, for example, while a rational law enforcement officer, dedicated to maximizing the deterrent power of the law and the efficacy of police investigations, would no doubt deem it entirely reasonable to conduct spot searches or searches based on trained intuition in order to uncover evidence of wrongdoing, the Fourth Amendment has always been understood to embody a higher value than promoting the most efficient or most effective law enforcement techniques. As the Court has stated:

The needs of law enforcement stand in constant tension with the Constitution's protection of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. [*Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973)].

To protect the values of the Fourth Amendment, the Court has held that "individualized suspicion is usually a prerequisite to a constitutional search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-62 (1976). In most cases, that suspicion must reach the level of "probable cause" before a search (or seizure) is permitted; in our society we have decided that at "that point it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security." *Winston v. Lee*, 470 U.S. 753, 758 (1985).

The probable cause requirement is not an absolute, of course; "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable' " the Court has "permitted exceptions" to that requirement and authorized searches on a "lesser quantum of evidence," viz., on "reasonable" (rather than probable) cause, *Griffin v. Wisconsin*, — U.S. —, 55 L.W. 5156, 5157-58 & n.4 (June 23, 1987) (emphasis added). See also *O'Connor v. Ortega*, — U.S. —, 55 L.W. 4406 (March 31, 1987); *New Jersey v. T.L.O.* 469 U.S. 325 (1985). And the Court has even held that individualized suspicion is not an "irreducible requirement" of the Fourth Amendment. *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 561.

But for present purposes the essence of the matter is this: "[e]xceptions to the requirement of individualized suspicion are generally appropriate *only where the privacy expectation implicated by a search are minimal.*" *New Jersey v. T.L.O.*, *supra*, 469 U.S. at 342 n.8. Accordingly, as the Solicitor General at least implicitly concedes, to sustain Subpart C the Government must establish that "[t]he FRA regulations entail a minimal intrusion on employees' expectation of privacy." Pet. Br. at 25. As we proceed to show, the intrusion on privacy here is anything but minimal.

1. Subpart C requires that both a blood and a urine sample be collected from each covered employee following each covered accident/incident. Blood testing, of course, necessitates an "intrusion[] into the human body." *Schmerber v. California*, 384 U.S. 757, 767 (1966). And urine testing, at least as mandated by the FRA, requires that an individual expose herself; urinate on command while a government agent watches; and then turn over the urine to the government for a chemical analysis.¹¹

There can be no doubt that such forced blood and urine collection implicates vital Fourth Amendment interests, "the individual's dignitary interests in personal privacy and bodily integrity," *Winston v. Lee*, *supra*, 470 U.S. at 761. See AFL-CIO Br. in No. 86-1879 at 8-13.¹² That the collection occurs, under the FRA regulation, immediately after a traumatic event, viz., an accident, at a time when the employee is likely to feel especially vulnerable, and takes place under an aura of suspicion, with the test results going directly to the Federal Government in Washington, makes the "psychological intrusion," *Delaware v. Prouse*, 440 U.S. 648, 657 (1979), all the more severe, and the Fourth Amendment concern that much greater.

2. The Solicitor General nonetheless attempts to minimize the Fourth Amendment interests that are involved here by seeking to trivialize both the nature of the procedures that are required under Subpart C and the privacy expectations of the employees who are subject to

¹¹ The FRA's *Alcohol and Drug Field Manual*, Unit D, §§ 4.5.2, 4.5.3 at p. D-5 requires that the employee urinate "[u]nder direct observation" by the technician of the medical facility at which the urine is being collected.

¹² See also Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968):

[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem.

those procedures. The Solicitor General's argument fails at all points.

(a) The fundamental error in the Government's submission is its failure to come to grips with the fact that the Fourth Amendment interest that is implicated here is the interest in "*bodily integrity*." This Court has never held an invasion of that interest—an invasion of the body—to be a "minimal intrusion on . . . expectation[s] of privacy." *Cf.* Pet. Br. at 25. To the contrary, the Court has ruled that even the process of removing "scrapings" from under the fingernail "constitute[s] the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973). And whereas all searches of property are permissible where sufficient justification is shown, the Court has held that some invasions of the body are *per se* unconstitutional regardless of the strength of the government's justification. *See Winston v. Lee, supra*. In short, there is no higher Fourth Amendment value than the protection of the individual's bodily integrity.¹³

Contrary to the Solicitor General's suggestion, the fact that it "has become routine in our everyday life" for individuals to voluntarily submit to the "blood test procedure" or for men to voluntarily urinate in view of other men, Pet. Br. at 35-36, is of no relevance in assessing whether the privacy expectations at stake here are minimal or substantial. By a parity of reasoning, general searches of the home could equally be characterized as minimally intrusive inconveniences since it is equally commonplace for homeowners to invite guests to visit in (and household employees to work in) the home.

¹³ *Cf. Schmerber v. California, supra*, 384 U.S. at 767-68 ("Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers . . . we write on a clean slate").

As this hypothetical illustrates, the determinative issue regarding the existence *vel non* of a reasonable expectation of privacy is *whether the individual claiming such an expectation has retained control over access*; the frequency with which the individual has on a selective case-by-case basis voluntarily opened up that which she otherwise has elected to keep private says nothing about whether a *forced* government entry is proper. Not surprisingly the cases in which this Court has found privacy expectations to be minimal or nonexistent have involved, in the main, situations in which the individual claiming the privacy expectation could not reasonably expect to determine whether an intrusion would occur.¹⁴

Similarly, and again contrary to the Solicitor General's suggestion, the fact that under Subpart C the blood and urine samples are taken from employees who work in the railroad industry is quite beside the point. The "operational realities of the workplace" may lead employees to have a diminished expectation of privacy "in their place of work"—*viz.*, "in their offices, desks and file cabinets"—at least with respect to "an intrusion [which] is by a supervisor," but it is equally true that . . . [n]ot everything that passes through the confines of the business address can be considered part of the workplace context." *O'Connor v. Ortega, supra*, 55 L.W. at 4407-08 (emphasis added).

In particular, in our society employees do *not* surrender their expectation of privacy with respect to their

¹⁴ *California v. Greenwood*, — U.S. —, 56 L.W. 4409 (May 16, 1988) (bags of garbage placed outside for collection); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (aerial photographs of outdoor areas); *California v. Ciraolo*, 476 U.S. 207 (1986) (same); *New York v. Class*, 475 U.S. 106 (1986) (vehicle identification number required to be in plain view); *Maryland v. Macon*, 472 U.S. 463 (1985) (books in bookstore); *Smith v. Maryland*, 442 U.S. 735 (1979) (phone numbers called from one's telephone); *United States v. Miller*, 425 U.S. 435 (1976) (checks, deposit slips and the like held by a bank).

bodily integrity each time they report to work any more than employees surrender their expectation of privacy with respect to their "handbag or briefcase each workday." *Id.* at 4407. See AFL-CIO Br. in No. 86-1879 at 13-14. And while, as the Solicitor General observes, the railroad industry is "subject to extensive public and private regulation," Pet. Br. at 26, nothing in that regulatory scheme—"the 'bulk' of [which] . . . relate[s] to the fixed facilities and equipment, not to personnel," *id.* at 30 n.30—suggests that railroad employees' have diminished expectations of privacy with respect to the integrity of their bodies.

The closest the FRA comes to identifying some pre-existing practice or regulation even remotely bearing on railroad employees' privacy expectations is its assertion that "the railroads have historically imposed exacting physical requirements for employment in particular posts, including periodic physical exams that typically involve taking blood and urine samples." Pet. Br. at 29. But as we showed in our brief in *von Raab*, physical examinations are conducted in a medical environment for medical reasons by medical personnel who are subject to the constraints of the medical profession with respect to disclosing the test results, and thus the existence of such programs does not diminish the employees' reasonable expectations of privacy with respect to the type of government-mandated drug testing at issue here. AFL-CIO Br. in No. 86-1879 at 24-26.¹⁵

¹⁵ In *von Raab*, the Solicitor General has argued that "the government, in its capacity as an employer, may impose reasonable employment-related restrictions on the rights of employees that would be plainly unconstitutional if imposed on citizens at large." Br. for Resp. in No. 86-1879 at 20, citing, e.g., *Connick v. Meyers*, 461 U.S. 138, 147 (1983) ("a federal court is not the appropriate forum to review the wisdom of a personnel decision taken by a public agency").

It is important to note that, whatever its merits, that argument has no force here since in this case the Government is not

(b) For all these reasons, this case is poles apart from *New York v. Burger*, — U.S. —, 55 L.W. 4890 (June 19, 1987), the Court's most-recent administrative search case, on which the Solicitor General relies. Pet. Br. at 26, 30. In that case the Court sustained an inspection, without individualized suspicion, of the inventory of an automobile junkyard. But that inspection implicated only a minimal privacy interest for two reasons.

First, as the Court explained, the search in *Burger* "was of a commercial premises," and "[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home." 55 L.W. at 4893. Second, junkyard dealers are so "closely" and "pervasively" regulated, *id.*, that the junkyard dealer "cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes," *id.* at 4894 n.16, quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). The *Burger* Court thus analogized the junkyard business to the business of selling firearms, 55 L.W. at 4892, and quoted *United States v. Biswell*, 406 U.S. 311, 316 (1972), in which the Court had found that "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."

This case, in contrast, involves searches of the *person*, and not of "commercial property." And *nothing* in the regulations or practices on which the Solicitor General relies suggests that employees who work on railroads "cannot help but be aware" that they will be subject to forced periodic searches by the Government which *compromise their bodily integrity*. Thus, the testing required by Subpart C does invade a significant expectation of

acting as employer; rather, the Government is acting in its traditional role of regulator of private employers.

privacy. Because that is so, *New Jersey v. T.L.O.* requires some measure of individualized suspicion to justify the intrusions. P. 8 *supra*. As Subpart C mandates searches absent such suspicion, the regulation is constitutionally infirm.¹⁶

B. In light of the foregoing, the Solicitor General's discussion, Pet. Br. at 36-39, of the "governmental interests" served by Subpart C is ultimately beside the point; indeed, we do not understand the Solicitor General to claim that these interests can support the regulation if, as we have shown to be the case, significant privacy interests are in fact implicated. Nonetheless, our discussion

¹⁶ In *New Jersey v. T.L.O.*, the Court stated a second and independent requirement for dispensing with individualized suspicion: "'other safeguards' [must be] available 'to assure that the individual's reasonable expectation of privacy is 'not subject to the discretion of the official in the field.''" 469 U.S. at 342 n.8.

In the instant case, Subpart C, while placing on the railroads mandatory obligations to conduct testing, leaves it to the "railroad representative responding to the scene of the accident/incident [to] determine whether the accident/incident falls within the requirements of . . . this section." 45 C.F.R. § 219.201(c). The "railroad representative" thus must make a series of quasi-factual determinations as to whether, *e.g.*, the accident caused "[d]amage to railroad property of \$50,000 or more"; which employees were "directly and contemporaneously involved in the circumstances of the accident/incident" and which employees "had no role in the causes(s) of the accident/incident"; and whether the "safety and convenience of passengers" requires that the crew continue operating the train rather than report for testing. See 45 C.F.R. §§ 219.201(a)(ii), .203(a)(2), (a)(3)(i), (b)(3). As a result, to a considerable degree Subpart C leaves railroad employees subject to the "discretion of the official in the field" as to whether they will or will not be tested.

The question of whether field officials are adequately controlled when so much fact-finding discretion remains is an open one in this Court, and a question of considerable difficulty. We do not pursue that question here because, in any event, as we have showed in text, the searches mandated by Subpart C infringe a substantial expectation of privacy.

would be incomplete if we did not at least briefly review the two justifications advanced for the FRA regulations.

1. The Solicitor General first argues that the post-accident testing mandated by Subpart C will "help to deter employees from using alcohol and drugs on the job." Pet. Br. at 38, *quoting*, 50 Fed. Reg. 31541 (1985). That rationale could be used to justify any drug testing program and indeed any type of search. Permitting searches without individualized suspicion can almost always be said to deter the wrongdoing the search is designed to ferret out; the common sense of the matter is that some wrongdoers will be sufficiently confident of their own ability to avoid raising suspicion that they will fear only random—as distinguished from cause-based—police investigations. If this rationale were sufficient to justify a search, the Fourth Amendment would be drained of its vitality. Not surprisingly, therefore, the Court has squarely rejected this rationale when advanced to justify other searches not supported by individualized suspicion. *E.g.*, *Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 273 ("It is not enough to argue . . . that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one").¹⁷

2. The FRA alternatively argues that its program of post-accident testing will "permit the agency 'to deter-

¹⁷ Ironically, the instant case may be one of the few in which there is reason to doubt the Government's claim that permitting searches without individualized suspicion will have a deterrent effect on those subject to the searches.

The claim for deterrence here rests on the premise that employees who are so fearless or foolish as to be unaffected by the prospect that their use of drugs or alcohol may *cause* an accident in which the employees themselves *will be at risk*—and who are thus willing to put their own life and the lives of others on the line—nonetheless will be deterred by the prospect that if an accident meeting certain criteria occurs, the employees' blood and urine will be tested. That is, at the least, a questionable premise.

mine with greater precision the causes of major accidents of interest to the public' and thereby to take further measures to safeguard the general public." Pet. Br. at 38-39, *quoting*, 50 Fed. Reg. 31541 (1985). This argument, unlike the first, is carefully tailored to support only post-accident drug testing rather than all forms of drug testing. Nonetheless, the argument does not withstand close scrutiny.

We do not doubt that the Government has a significant interest in ascertaining the cause of train accidents; indeed that interest is much like the governmental interest in ascertaining the causes of fires. See *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978). And in *Clifford* and *Tyler* the Court went so far as to sustain warrantless, investigative searches conducted by fire officials without individualized suspicion of wrongdoing. But as might be deduced from the Solicitor General's failure even to cite those cases, the searches mandated by Subpart C of the FRA regulations go further than even *Clifford* and *Tyler* allow.

Clifford and *Tyler* permit fire investigators to conduct administrative searches of premises damaged by "a fire of undetermined origin." *Clifford*, 464 U.S. at 294. The permitted search must "not intrude unnecessarily on the fire victim's privacy" and must "be executed at a reasonable and convenient time." *Id.* Moreover, the scope of the search must be "limited to that reasonably necessary to determine the cause and origin of a fire and to ensure against rekindling." *Id.* at 297. And very much to the point here, if "the primary object of the search is to gather evidence of criminal activity," *id.* at 294, or if, in the course of the search, "the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution," *Tyler*, 436 U.S. at 512, a "showing of prob-

able cause" is required. *Clifford*, 464 U.S. at 294; *Tyler*, 436 U.S. at 512.

In at least two respects, the searches mandated by Subpart C of the FRA regulation go beyond the carefully confined permission for administrative searches recognized in *Clifford* and *Tyler*.

First, the regulation requires testing for *all* employees and *all* accidents, without regard to whether the particular test is necessary or even useful in ascertaining the accident's cause. The regulation thus leaves virtually no room for judgments to be made as to which employees are most implicated or least implicated in the accident; the only time drug testing is excused is if the "railroad representative" who "responds to the scene" can "immediately determine on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident," and even that narrow exception is inapplicable with respect to "major train accidents," *viz.*, those involving a fatality, release of a hazardous material, or over \$500,000 in property damage, 45 C.F.R. § 219.204(a)(3). And the regulation does not require, or even permit, the railroad to limit the testing to employees suspected of being under the influence of a drug even though the record demonstrates that railroad representatives responding to accidents can be trained to make such assessments in a reliable way on the basis of non-intrusive examinations.

Second, Subpart C mandates two discrete intrusions on privacy, the collection of blood and the collection of urine, each of which raises independent Fourth Amendment concerns. Yet blood testing *alone* is sufficient—and, indeed, is necessary—to determine whether the individual tested is under the influence of a drug at the time of the test. Because the drug works its influence only while is in the blood stream, the only individuals who will test positively

on a urine test but not on a blood test are individuals who used a drug long enough in the past to no longer feel its effects but who still have a metabolite (or by-product) in their urine. Urine testing, in other words, adds *nothing* to an investigation genuinely concerned with identifying the cause of an accident and therefore expands the scope of the search in a wholly unwarranted fashion.¹⁸

Because Subpart C mandates testing in every case and mandates both blood and urine testing, the regulation mandates searches which are not "reasonably necessary to determine the cause" of a train accident and which "intrude unnecessarily" on the privacy of railroad employees. *Clifford*, 464 U.S. at 294, 297. Indeed the Subpart C urine tests are explicable only on the theory that the true purpose of the test is not administrative/investigative but rather "to gather evidence of criminal activity." *Id.* at 294. In all events, at least this much is clear: the searches required by Subpart C cannot be squeezed within the holding and rationale of this Court's fire-inspection cases. And there is no other basis on which the blood and urine testing mandated by the regulation can stand. The regulation should therefore be held to be violative of the Fourth Amendment.

¹⁸ Significantly, Subpart D of the FRA regulations, which authorizes (but does not require) drug testing in circumstances not covered by Subpart C, requires only urine testing but gives the employee the option of providing a blood sample, *see* 45 C.F.R. §§ 219.305(d), .309; under the regulation the employee must be informed of this option at the time the sample is collected, must be told that the "blood test will provide information pertinent to current impairment," and must be advised as follows:

Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to *sixty* days before the sample is collected). As a general matter, the test cannot distinguish between recent use off the job and current impairment. [*Id.* § 219.309(b)(2).]

II. Subpart D Of The FRA's Regulations Exceeds The FRA's Authority Under The Federal Railroad Safety Act.

Subpart D of the FRA's regulations, unlike Subpart C, *does not require* any drug testing but merely provides "authorization" to the railroads under defined circumstances, such as on the employee's violation of one of various operating rules, to conduct such testing as the railroads deem appropriate. The parties have urged this Court to decide the constitutionality of this "authorization," and in so doing to resolve the novel question of whether searches conduct by a private party pursuant to governmental authorization must satisfy the dictates of the Fourth Amendment. *See* Pet. Br. at 24-25 n.26; Pet. App. 10a-13a.

In our view, however, it is not necessary, and therefore not appropriate, to resolve this constitutional issue. *Cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, S., concurring.) For, as we proceed to show, Subpart D is so clearly contrary to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), as to fall outside the FRA's regulatory authority under the Federal Railroad Safety Act, 45 U.S.C. §§ 421 *et seq.* ("FRSA")¹⁹

A. It is important to be clear at the outset as to precisely what is intended by the "authorization" of drug testing contained in Subpart D. The Solicitor General coyly notes that Subpart D was promulgated "in part to

¹⁹ The court of appeals in this case considered and rejected a variety of statutory arguments, including several based upon the RLA. *See* Pet. App. at 32a-34a. It is not entirely clear to us whether the argument developed in text was subsumed within any of the statutory contentions pressed before the lower courts.

Nonetheless because this is a pure question of law, because the FRA will have a full opportunity to respond to our submission in its reply brief, and because a ruling on this ground would avoid a needless constitutional decision, we believe the Court is free to reach the statutory issue even if the issue had not been squarely presented below.

preempt state and local rules that might otherwise have prohibited breath and urine testing by private employers." Pet. Br. at 25 n.26.²⁰ But as the preamble to the regulation makes clear, the far larger purpose of Subpart D is to relieve railroads of their obligations under the RLA to meet and confer with the representatives of their employees before instituting a drug testing program and to relieve railroads of the obligation to comply with their lawful collective bargaining agreements regulating drug testing. Thus, the FRA explained the need for the regulation in the following terms:

Although the railroads clearly desire to prevent alcohol and drug-related accidents, and have obvious incentives to do so, *the policy of the Railway Labor Act, as construed in arbitration and in the courts, severely limits the ability of management to implement new techniques to control the problem. . . . [P]rograms of testing would . . . be deemed to offend the status quo policy of the Railway Labor Act, if implemented by unilateral action of management.*

²⁰ It is far from clear that Subpart D can have such preemptive effect. Section 205 of the FRSA, 45 U.S.C. § 205, provides in pertinent part that:

The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be *nationally uniform* to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement.

As the statutory language indicates, in enacting this section Congress intended that "[o]nce the Secretary has prescribed a *uniform national standard*, the State would no longer have authority to establish Statewide standards." H.R. Rep. 91-1194, 91st Cong. 2d Sess. at 19 (1970) (emphasis added). Subpart D, however, does not in any meaningful sense establish national uniformity; under that Subpart it is left to each railroad to decide whether and to what extent to administer drug tests following rule violations. Whether this is the type of federal standard that can displace state law is thus open to the most serious question.

In theory, of course, the railroads could bargain with employees to obtain the right to test. But history suggests that there is no real likelihood that such an agreement could be reached . . . [50 Fed. Reg. 31528 (1985); emphasis added.]

And the FRA explained the effect that Subpart D would have as follows:

[T]he regulation supersedes any provision of a collective bargaining agreement, or arbitration award construing such an agreement, and preempts any State law limiting the ability of an employer to require testing.

This does not mean that a railroad may not enter into collective bargaining agreements relating to conditions under which tests may be conducted. The railroad may do so and is free to observe, as a matter of practice, any constraints contemplated by the agreement, so long as the railroad is not inhibited from effective enforcement of these regulations. *However, the railroad may not divest itself of the authority conferred by this section . . . The authority conferred here is conferred for the purpose of promoting the public safety, and a railroad may not shackle itself in a way inconsistent with its duty to promote the public safety.* [Id. at 31552; emphasis added]

B. It is difficult to imagine a more frontal assault on the RLA and its policies. The RLA rests on the premise that "stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." *Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330, 336 (1960). To achieve such terms the Act "safeguards an opportunity for employees to obtain contracts through collective rather than individualistic bargaining." *Id.* Indeed, the duty to bargain stated in RLA § 2, First, 45 U.S.C. § 152, First, lies at

"the heart of the Railway Labor Act," *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 377 (1969).²¹

"[A]bsent a collective bargaining agreement," management "hires and fires, pays and promotes, supervises and plans . . . freely except as limited by public law and by the willingness of the employees to work under the particular, unilaterally imposed conditions." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). The very point of the collective bargaining system which the RLA (and the National Labor Relations Act) seek to foster is thus to enable employees to secure legally-enforceable rights which will "regulate or restrict the exercise" of management's otherwise unfettered prerogatives. *Id.*

In promulgating Subpart D, the FRA has, in essence, decided that the judgments Congress made in enacting the RLA were wrong (at least with regard to drug testing); collective bargaining is not, in the FRA's view, an effective or desirable means of promoting rail safety. Rather, according to the FRA, rail safety is best served by assuring employers unfettered discretion to decide whether

²¹ Equally "central to [the] design" of the RLA is the Act's "status quo requirement," viz., the obligation "to refrain from altering the status quo by resorting to self-help while the Act's remedies [a]re being exhausted." *Shore Line v. Transportation Union*, 396 U.S. 142, 150, 148 (1969). The "immediate effect" of that requirement

is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce. [*Id.* at 150]

and to what extent to administer drug tests. Thus, the point of Subpart D is not only to allow employers to act unilaterally with respect to drug testing—itself a cardinal violation of the RLA—but to remove that subject from the bargaining table altogether.

The FRA's action, moreover, it must be stressed is *not* based on the belief that safety considerations *require* testing in Subpart D circumstances. Had the FRA mandated drug testing beyond Subpart C's requirements, rather than leaving the matter to unilateral employer decision-making, such FRA action would be judged against the longstanding rule that the bargaining contemplated by the RLA takes place against the background of "minimum requirements laid down by state authority . . . regulating working conditions." *Terminal Assn. v. Trainmen*, 311 U.S. 1, 7 (1943).²² But because Subpart D seeks to preserve for employers the discretionary right to test employees, the regulation "comes into conflict" with the RLA's "policy of protecting collective bargaining." *California v. Taylor*, 353 U.S. 553, 559 (1957).²³

²² Cf. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-58 (1985); *Fort Halifax Packing Co. v. Coyne*, — U.S. —, 55 L.W. 4699, 4704-05 (June 1, 1987).

²³ In *California v. Taylor*, this Court held that a state cannot apply its civil service law to state employees working on a state-owned railroad regulated by the RLA because "[t]his state civil service relationship is the antithesis of that established by collectively bargained contracts through the rail industry." 353 U.S. at 559. The Court distinguished *Terminal Ass'n* as a case involving "minimum health and safety regulations in the interests of railway employees" which "did not concern a conflict between federally protected collective bargaining and inconsistent state laws." *Id.* at 560 n.8. Cf. *Cox, Recent Developments in Federal Labor Laws Preemption*, 41 Ohio St. L.J. 277, 297-98 (1980) (arguing that "the NLRA leaves the states free to regulate employment conditions, provided that the state legislation does not discriminate against collective bargaining" but that a state law whose only policy is that certain subjects "should not be fixed by collective bargaining" is preempted).

Indeed, if Subpart D were deemed to fall within the FRA's statutory authority under the Railroad Safety Act, the FRA would be equally free to remove any other, safety-related subject from the scope of mandatory bargaining on the same rationale proffered here, *viz.*, that bargaining under the RLA is too cumbersome a process and that employer discretion is too important with respect to the particular matter at hand. Thus, the theory underlying Subpart D would ultimately leave the FRA free to act as the czar of a wide range of negotiability disputes under the RLA.

C. It follows that it would take an extraordinary showing to establish that Subpart D falls within the FRA's statutory authority. To defend its regulation the FRA ultimately must be able to show that the Railroad Safety Act authorizes the Agency to trump the RLA by precluding collective bargaining over matters which the RLA plainly commits to its bargaining process. Such "repeals by implication"—which is what the FRA's claim reduces to—"are not favored"; unless "[t]he intention of the legislature to repeal [is] 'clear and manifest'" the proper course is to "read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). And nothing in the language or history of the Railroad Safety Act supports the sweeping assertion of authority on which Subpart D necessarily rests.

1. Prior to the enactment of the Railroad Safety Act in 1970, "scant attention ha[d] been paid to railroad safety at either the State or Federal levels." S. Rep. 91-619, 91st Cong. 1st Sess. at 4 (1969). There were at that time only a handful of federal rail-safety statutes, most quite old, and each "appl[ying] to some very specific safety hazard"; for example, federal authority with respect to freight and passenger cars was limited "to safety

appliances and certain aspects of the brake system." *Id.* In the main, where standards existed prior to 1970, they were "self-imposed by the railroad industry" and were "completely voluntary." *Id.*

The Railroad Safety Act was passed because Congress was persuaded that these "[v]oluntary efforts on the part of railroads have failed to meet the need." *Id.* at 5. The basic point of the Safety Act was thus to authorize the "imposition of *mandatory* [safety] *standards* by the Secretary . . ." *Id.* (emphasis added).

The legislative history of that Act begins in 1968 with the submission to Congress by the Department of Transportation of a rail safety bill. H.R. 16890, 90th Cong. 2d. Sess. That bill faltered in the face of labor and management opposition and was not reported out of committee in either the House or the Senate; indeed at the House hearings Representative Springer, the ranking minority member of the Commerce Committee, commented that the hearing marked "the first time in a long time I can remember that a bill has appeared before this committee with which neither labor nor management is happy." *Hearings on Federal Standards for Railroad Safety*, House Comm. on Interstate and Foreign Commerce, 90th Cong. 2d Sess. 230 (1968) ("1968 House Hearings").

Among the issues that proved most controversial was the question of whether and to what extent to authorize the FRA to regulate railroad *employees*, as distinguished from railroad *equipment*. Section 3(a)(3) of H.R. 16890 would have permitted the FRA to promulgate "rules, regulations or minimum standards governing qualifications of employees and practices, methods and procedures of rail carriers"; that provision was the subject of a great deal of discussion and concern. See 1968 House Hearings at 61-65, 129-30, 227-32, 240-41, 256-57, 267,

272-73. Indeed, following the House hearings, Senator Hartke, chairman of the Senate Subcommittee on Surface Transportation, prepared a bill which the Senator introduced at the start of the next session of Congress, which would have denied the Secretary power to "issue rules, regulations, and standards relating to the qualifications of employees." S. 1933, 91st Cong. 1st Sess. § 2 (1968).

At about the same time that Senator Hartke introduced his bill, the new Secretary of Transportation concluded that "a new approach was imperative" and Secretary Volpe then appointed a labor-management Task Force on Railroad Safety. *Hearings on Federal Railroad Safety Act of 1969*, Subcomm. on Surface Transportation, Sen. Comm. on Commerce, 91st Cong. 1st Sess. 337 (1969). Within two months that task force submitted a unanimous report which DOT hailed as a "landmark development" which "sets the stage for a new era of cooperating in building a safe railroad system." *Id.* at 246. That report set in motion the process which led, in relatively short order, to the enactment of the Railroad Safety Act. See 115 Cong. Rec. 40204 (1969) (Sen. Prouty).²⁴

As part of the compromise which led the railroads to agree to support a federal law the task force unanimously recommended

1. That the Secretary of Transportation, through the Federal Railroad Administration, have authority to promulgate reasonable and necessary rules and regulations *establishing safety standards in all areas of railroad safety*, through such notice, hearing, and review procedures as will protect the rights of all interested parties. [See H.R. Rep. 91-1194, *supra*, at 75 (emphasis added) (reprinting Task Force report).]

²⁴ Indicative of the significance of the Task Force report is the fact that it is reprinted in full as an attachment to both the Senate and House Reports on the FRSA. See S. Rep. 91-619, *supra*; H.R. Rep. 91-1194, *supra*.

In implementing this recommendation, Congress went to pains to assure that the authority being conferred on the Secretary to regulate employee qualifications would be narrowly cabined. Thus, the Senate Commerce Committee added to the bill drafted by the Transportation Department, S. 3061, 90th Cong. 2d Sess., the penultimate sentence now found in § 202(a) of the FRSA, 45 U.S.C. § 431(a):

[N]othing in this title shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act, including agreements relating to the qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the secretary under this title.²⁵

The Committee explained:

The . . . sentence . . . is intended to preclude unwarranted interference by the Secretary of Transportation with any matters which traditionally have been or would have been subject to settlement through collective bargaining agreements. The pro-

²⁵ When the Senate bill reached the House, Secretary Volpe opposed the sentence which the Senate Commerce Committee had added on the ground that "there is some uncertainty as to whether agreements relating to qualifications of employees are now within the scope of the Railway Labor Act" and that Congress should not, in the FRSA, impliedly resolve that issue; thus Secretary Volpe urged that the statute simply permit agreements "not inconsistent with Federal safety requirements." *Hearings on Railroad Safety and Hazardous Materials Control*, Subcomm. on Transportation and Aeronautics, House Comm. on Interstate and Foreign Commerce, 91st Cong. 2d Sess. 30 (1970). Congress was unmoved by this objection; indeed the House Committee in its report stated:

The extent to which [sic] collective bargaining relating to qualifications of employees has not been considered subject to the Railway Labor Act, this section is intended to make it applicable to the Railway Act. [H.R. Rep. 91-1194, *supra*, at 17.]

tection for agreements arrived at through collective bargaining would not, however, extend to those agreements or elements thereof which were inconsistent with rules, regulations, or standards prescribed by the Secretary in accordance with the authority over railroad safety granted to him by this act. [S. Rep. 91-619, *supra*, at 6-7; emphasis added.]

The House Commerce Committee went still further and added the sentence now found as the final sentence in FRSA § 202(a):

Nothing in this title shall be construed to give the Secretary authority to issue rules, regulations, orders and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

And on the floor of the House members of the Commerce Committee assured the House that although the Secretary's regulatory authority "will necessarily involve personnel activities . . . [t]he Railway Labor Act is in no way changed or affected by this law." 116 Cong. Rec. 27612 (1970) (Rep. Springer). "We do not repeal any portion of the Railway Labor Act and the matter of collective bargaining pertaining thereto." *Id.* at 27613 (Rep. Pickle).

2. The legislative history of the Railroad Safety Act, then, rather than supporting any possible claim that the Safety Act was intended to authorize the FRA to preclude bargaining over a mandatory subject under the RLA, negates that claim. Three aspects of that history are especially significant here.

First, in enacting the Railroad Safety Act Congress sought to vest the FRA with the authority to promulgate *mandatory* standards to replace "voluntary efforts" by the railroads. A regulation like Subpart D, which simply leaves the railroads free to do what they will with

respect to drug testing, was thus the furthest thing from Congress' mind in 1970.

Second, in creating this regulatory authority, Congress went to pains to place statutory limits on the Secretary of Transportation's power over railroad employees. Congress did so in order "to preclude unwarranted interference by the Secretary of Transportation with any matters which traditionally have been or would have been subject to settlement through collective bargaining." P. 27 *supra*.

Third, and most important of all, the congressional sponsors of the law gave express assurances that the FRSA did not "repeal" and would "in no way change[] or affect[]" the Railway Labor Act. P. 28 *supra*.

The Railroad Safety Act thus leaves no room for a regulation like Subpart D whose purpose and effect is to place in the exclusive discretion of railroad employers a matter that the RLA requires be settled by collective bargaining.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

18
No. 87-1555

Supreme Court, U.S.

FILED

SEP 9 1988

JOSEPH E. SPANIOLO, JR.,
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1988

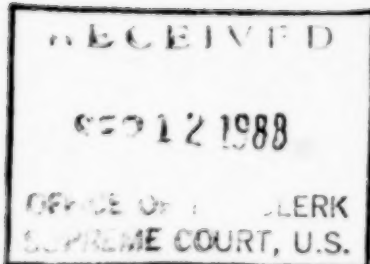
JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF
TRANSPORTATION, ET AL., PETITIONERS,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEAL FOR THE NINTH CIRCUIT*

**BRIEF FOR AIRCRAFT OWNERS & PILOTS
ASSOCIATION AS AMICUS CURIAE IN
SUPPORT OF RESPONDENTS**



SCOTT D. RAPHAEL
LAW OFFICES OF SCOTT D.
RAPHAEL

1201 Dove Street, Suite 600
Newport Beach, CA. 92660
(714) 851-8950

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Argument:	
Abandonment of the Individualized Suspicion Prerequisite for Mandatory Drug Testing Would Extinguish Fourth Amendment Protection for Any Holder of a Certificate or License Issued by a Governmental Agency	4
Conclusion	14

TABLE OF AUTHORITIES

Cases:	
<i>Camara v. Municipal Court</i> , 387 U.S. 523 (1967)	8
<i>Colonnade Catering Corp. v. United States</i> , 397 U.S. 72 (1970)	11
<i>Davis v. United States</i> , 328 U.S. 582 (1946)	14
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981)	10, 11, 12
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977)	12
<i>Lustig v. United States</i> , 338 U.S. 74 (1949)	5
<i>National Treasury Employees Union v. Von Raab</i> , 816 F.2d 170 (5th Cir. 1987), cert. granted, No. 86-1879 (Feb. 29, 1988)	8
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	2, 5, 6, 7, 11, 12
<i>O'Connor v. Ortega</i> , No. 85-530 (Mar. 31, 1987)	4, 5, 6, 11, 12
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928)	15
<i>Rushton v. Nebraska Public Power Dist.</i> , 844 F.2d 562 (8th Cir. 1988)	10
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	5, 6
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3rd Cir.) cert. denied, 479 U.S. 986 (1986)	10
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	5, 7
<i>United States v. Biswell</i> , 406 U.S. 311 (1972)	10, 11, 12
<i>United States v. Cortez</i> , 449 U.S. 411 (1981)	7
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	9
<i>United States v. Montoya De Hernandez</i> , 473 U.S. 531 (1985)	5, 6, 7, 9, 13, 14
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983)	9

(II)

Constitution, Statutes and Regulations:

U.S Constitution:

Art. I, § 8, cl. 3

Amend. IV

9
3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15

Statutes:

5 U.S.C. §§ 553(b)

11, 12, 13

Regulations:

53 Fed. Reg. (1988)

p. 8368

p. 8374

p. 8369-8370

p. 8375-8376

p. 18250

2
2
3
3
3

Miscellaneous:

8 Am.Jur.2d, Aviation, §§ 148, et. seq.

7

In The Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1555

**JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF
TRANSPORTATION, ET AL., PETITIONERS,**

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, ET AL.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEAL FOR THE NINTH CIRCUIT**

**BRIEF FOR AIRCRAFT OWNERS & PILOTS
ASSOCIATION AS AMICUS CURIAE IN
SUPPORT OF RESPONDENTS**

This amicus curiae is submitted in support of respondents, Railway Labor Executives, et al. By letters filed with the Clerk of the Court, both petitioners and respondents, through their respective counsel of record, have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Aircraft Owners & Pilots Association (AOPA) comprises more than 270,000 pilots, aircraft owners, and aviation professionals worldwide. For more than 50 years the AOPA

has been the world's largest organization dedicated to the promotion, development, and responsible self-regulation of civil aeronautics.

Aware of its significant role in deterring the use of aircraft in illegal activities, AOPA has continuously supported and participated in federal, state and local efforts to interdict the smuggling and abuse of illicit narcotics. However, AOPA is keenly aware of the need, as so wisely observed by Justice Brennan, to safeguard our most deeply cherished, fundamental constitutional rights against the potential expedience posed "by consulting the momentary vision of the social good." *New Jersey v. T.L.O.*, 469 U.S. 325, 371 (1985) (Brennan, J., dissenting).

On March 14, 1988, the Federal Aviation Administration (FAA) promulgated a Notice of Proposed Rulemaking (NPRM) proposing the adoption of a sweeping "Anti-drug Program for Personnel Engaged in Specified Aviation Activities." (See, 53 Fed. Reg. 8368).¹

The Anti-drug testing program proposed by the FAA's NPRM bears close resemblance to the FRA regulations on review before this Court.² However, the NPRM would go considerably further in requiring employer-administered-drug testing than the FRA regulations. The NPRM would mandate not only post-accident and "reasonable suspicion" testing, but randomized testing of all employees without any

1. An excerpt from the Federal Register, Volume 53, No. 49, March 14, 1988, containing the NPRM at page 8368 has been lodged with the Clerk of the Court.

2. The NPRM would require each employer of virtually every commercially-related domestic aviation activity to adopt a mandatory drug testing program for the testing of each of his/its employees. The mandatory blood and urine testing for employees would not test for alcohol, but would test for the same five (5) drugs as the FRA regulations, cocaine, marijuana, opiates, phencyclidine (PCP), and amphetamines. (53 Fed. Reg. 8374).

prerequisite individualized suspicion whatsoever.³

AOPA's interest in this proceeding is based upon the identity of the threshold constitutional questions presented by the FRA regulations at issue and the drug-testing NPRM. The issue of mandatory, randomized testing is not directly raised by the FRA regulations. AOPA is concerned, however, that the Fourth Amendment approach which petitioners have urged the Court to adopt in reviewing post-accident testing, appears intended to establish broad authorization of any form of governmentally-mandated drug testing, without individualized suspicion, including the NPRM's randomized testing provisions.

AOPA is opposed to such intrusive, randomized, agency-imposed testing on an industry-wide scale, particularly since the searches prescribed by both the FRA regulations and the NPRM are not justified by individual cause. On the contrary, their stated intent is to become a tool of administrative expedience, an admitted "deterrent" to hypothecated potential drug abuse industry-wide, of which the FAA's NPRM concedes there is no evidence. (53 Fed. Reg. 8369-8370).

Petitioners herein, including Petitioner Burnley who, in his capacity as Secretary of Transportation has personally chaired public hearings on the FAA's drug-testing NPRM (53 Fed. Reg. 18250), have submitted that this Court should should abandon the "individualized suspicion" prerequisite for all such intrusive bodily searches mandated by agency regulation. AOPA views the NPRM as evidence that such a standard would ultimately eliminate all Fourth Amendment protection

3. The NPRM would require five (5) kinds of testing, 1. pre-employment testing; 2. periodic testing, such as during routine medical examinations; 3. randomized testing as "the primary deterrent method in the anti-drug program;" 4. post-accident testing (analogous to the FRA regulations herein); and 5. testing based on a "reasonable and articulable belief that a[n]...employee is using drugs." (53 Fed. Reg. 8375- 8376).

for every public or private employee within any agency-regulated activity, to be free from the casual use of such deeply and personally intrusive administrative searches.

Acknowledging Justice Scalia's concern with the problems inherent in a "case-by-case" analysis of Fourth Amendment standards,⁴ AOPA believes the constitutional questions herein should be reviewed with the understanding that the Fourth Amendment approach adopted will have significant long-term implications upon even more sweeping, less individualized suspicion-based searches, presently under consideration within other agency-regulated industries by the very petitioners herein.

ARGUMENT

ABANDONMENT OF THE INDIVIDUALIZED-SUSPICION PREREQUISITE FOR MANDATORY, AGENCY-IMPOSED DRUG TESTING WOULD EXTINGUISH FOURTH AMENDMENT PROTECTION FOR ANY HOLDER OF A CERTIFICATE OR LICENSE ISSUED BY A GOVERNMENTAL AGENCY.

AOPA believes petitioners have misconstrued the Court's traditional approach to analysis of the Fourth Amendment issues raised by the FRA regulations before the Court. AOPA

4. "[T]his Court has repeatedly acknowledged the difficulties created for the Courts...and citizens by an ad-hoc case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances," *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 105 S.Ct. 1492, 1505, (Scalia, J., concurring) (objecting to "the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field." *Ibid.*, 105 S.Ct. at 1505).

submits that the Circuit Court correctly concluded, as conceded by petitioners, that the FRA's disputed blood and urine testing regulations are bodily searches, to which Fourth Amendment safeguards apply (Pet. Brief 24).⁵ "Although the underlying command of the Fourth Amendment is always that such searches be reasonable, what is reasonable depends on the context within which such a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985).

The Fourth Amendment analysis thus far utilized by this Court in "[d]etermining the reasonableness of any search involves the twofold inquiry: first, one must consider 'whether the...action was justified at its inception,' [citations]; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Ibid.*, 469 U.S. at 342-343, citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968).⁶

The "justified at its inception" prerequisite has further been refined to mean that there must be reasonable grounds for suspecting that the search will turn up evidence of the misconduct in question, *New Jersey v. T.L.O.*, 469 U.S. 325, 342-343 (1985), or for a noninvestigatory purpose "such as to retrieve a needed file." *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 107 S.Ct. 1492 at 1503.

The Court has opined that it has yet to address the issue of the need for "individualized suspicion" as an essential element

5. 839 F.2d 575 at 580. *Schmerber v. California*, 384 U.S. 757, 767 (1966). See, also, *United States v. Montoya De Hernandez*, 473 U.S. 539 (1985). Petitioners do not seriously contend that the breath and urine testing provisions under Subpart D authorizing such testing are beyond the reach of the Fourth Amendment. As part of a pervasive, federal scheme, there is little doubt the Court of Appeals also correctly determined the FRA regulations, in their entirety, entertain such dominant "state action" as to bring all of the drug-testing provisions thereunder within purview of the Fourth Amendment. 839 F.2d at 580-582, citing *Lustig v. United States*, 338 U.S. 74, 79 (1949); *United States v. Guest*, 383 U.S. 745, 755-756 (1966).

6. See, also, *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987).

of the foregoing reasonableness standard regarding searches of children's handbags by school authorities,⁷ or governmental supervisors of their employees' offices.⁸ Nonetheless, in each case, it has found such individualized suspicion justifying the search.⁹ However, as distinguished from searches of mere personalty, or office furniture in the workplace, the Court has made it clear that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such [bodily search] intrusions on the mere chance that the desired evidence might be obtained...[i]n the absence of a clear indication that in fact such evidence will be found..." *Schmerber v. California*, 384 U.S. 757, 769-770 (1966).

Thus far, although the Court has authorized such searches without a warrant,¹⁰ the Court has wisely declined to abandon the individualized suspicion prerequisite for warrantless searches of bodily fluids, as now urged by the petitioners. In recently reaffirming that requirement, the Court observed that "the words in *Schmerber* were used to indicate the necessity for particularized suspicion that the evidence might be found within the body of the individual, rather than as enunciating still a third Fourth Amendment threshold between 'reasonable suspicion' and 'probable cause.'" *United States v. Montoya De Hernandez*, 473 U.S. 531, 541 (1985).

Based on the Court's previous interpretation of the "reasonable suspicion" prerequisite for intrusive, warrantless searches of the human body, it would appear that, at worst, the Court of Appeals herein applied the correct Fourth Amendment analysis to the FRA regulations, yet arrived at the wrong

7. *New Jersey v. T.L.O.*, 469 U.S. 325, 343, (1985), fn. 8.

8. *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 107 S.Ct. 1492 at 1503.

9. See, *New Jersey v. T.L.O.*, 469 U.S. at 343, (1985), fn. 8; *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 107 S.Ct. at 1503.

10. The Court of Appeals correctly concluded "the exigences of testing for the presence of...drugs in blood, urine or breath require prompt action which precludes obtaining a warrant." 839 F.2d at 583; *Schmerber v. California*, 384 U.S. 757, at 770 (1966).

conclusion.

The Court of Appeal's adoption of the two-fold reasonableness test of "justified at its inception" and "reasonably related in scope" is consistent with this Court's well-settled standard of Fourth Amendment review. 839 F.2d at 587. See, *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *New Jersey v. T.L.O.*, 469 U.S. at 341 (1985). The soundness of the Court of Appeal's apparently factual conclusion that "accidents, incident, or rule violations, by themselves, do not create reasonable grounds for [individualized suspicion] of drug impairment" is certainly a more debatable issue.¹¹

AOPA finds it interesting that nowhere in petitioners' brief do they discuss the soundness of the Court of Appeal's conclusion that post-accident testing does not give rise to the individualized suspicion required to justify the intrusive bodily searches which drug testing admittedly comprises. This was precisely the Court's reasoning in reversing the Court of Appeals' decision in *United States v. Montoya De Hernandez*,

11. 839 F.2d at 587. The Court of Appeals concluded that, because accidents alone did not generate reasonable grounds for believing a search would turn up evidence of drug use or abuse, they did not meet the first prong of the reasonableness test, lacking "justification from their inception." *Ibid*, at 587. Arguably, in many jurisdictions, the inherent nature of the type of accident, such as an airplane crash, has been such as to raise a presumption of negligence on the part of the defendant under the traditional doctrine of *res ipsa loquitur*. See, generally, 8 Am.Jur.2d, Aviation, §§ 148, *et seq.* To the extent human factors are always arguably a possible accident cause, the Court of Appeals could just as easily have reasoned that "common-sense conclusio[ns] about human behavior upon which 'practical people' -- including government officials, are entitled to rely" provide the required suspicion to "justify at their inception" post-accident and post-incident drug-tests. See, *United States v. Montoya De Hernandez*, 473 U.S. at 543 (1985); *New Jersey v. T.L.O.*, 469 U.S. at 346 (1985); *United States v. Cortez*, 449 U.S. 411, 417 (1981).

473 U.S. 531 (1985).¹²

Instead, petitioners have urged the Court to abandon both its traditional, Fourth Amendment two-fold reasonableness analysis, and the particularized suspicion prerequisite for intrusive bodily searches altogether. Petitioners urge the Court to adopt a less structured, and much broader balancing-of-interests analysis, such as that utilized by the Court of Appeals in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) *cert. granted*, No. 86-1879 (Feb. 29, 1988) (Pet. Brief 19-24).

Petitioners' newly proposed test would resolve the Fourth Amendment questions raised by governmental drug-testing regulations, essentially by balancing the alleged impairment of the national, public safety against an individual's civil liberties. In sum, petitioners submit the Court should adopt the "administrative search" exception in addressing the Fourth Amendment questions presented by the drug testing regulations in question.

The Court of Appeals wisely declined to do so, observing, *inter alia*, that this Court's previous authority had not extended that doctrine beyond "inspections of property which are not personal in nature." 839 F.2d at 584-586, citing, *Camara v. Municipal Court*, 387 U.S. 523 (1967). AOPA submits that the Court of Appeals ruling on that point was correct and should be upheld.

Petitioners' claim that the Court of Appeals erred in presuming that the searches in question could not be reasonable under the Fourth Amendment absent individualized suspicion, reflects misplaced reliance in part upon this

12. Therein, the Court decided the Fourth Amendment question not by diminishing the boundaries of its protection through abandonment of the particularized suspicion prerequisite for all bodily searches, but by recognizing the Court of Appeals' error in finding such suspicion did not exist, given the experience of the trained customs inspectors and the "common-sense conclusio[n] about human behavior upon which 'practical people'...are entitled to rely." *Ibid.* at 543.

Court's clearly distinguishable rulings in "border search" cases.¹³ Even under the much-relaxed Fourth Amendment standard applied at the international border, this Court has still imposed the *de minimus* requirement of "a particularized and objective basis for suspecting the particular person" of the offense, evidence of which is the object of a personal, bodily search. See, *United States v. Montoya De Hernandez*, 473 U.S. 531, 542-543 (1985).

The balance of petitioners' argument reflects misplaced reliance upon this Court's previous decisions, creating an "administrative search" exception to the Fourth Amendment for statutorily-prescribed, warrantless searches of commercial property within closely regulated industries. (Pet. Brief 23-

13. (Pet. Brief 22) "[S]earches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad comprehensive powers '[t]o regulate Commerce with foreign Nations', Art. I, § 8, cl. 3 [citations omitted].... Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the person...are not subject to any requirement of reasonable suspicion, probable cause or a warrant..." *United States v. Montoya De Hernandez*, 473 U.S. 531, 538-539 (1985). Based on that narrow ground, warrantless opening of first-class, international mail is authorized on less than probable cause, *United States v. Ramsey*, 431 U.S. 606, 616-619 (1977); Motorists may be stopped at fixed checkpoints near the border without individualized suspicion, even if based largely on ethnicity, *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-563 (1976); and vessels on inland waterways accessing international seas may be boarded with no suspicion, *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

24).¹⁴ Although this Court yet to apply the "administrative search" exception beyond searches of commercial property as prescribed by statutory (as opposed to regulatory) schemes, the petitioners now urge this Court to do. To bolster that argument, petitioners cite nearly a century of Congressional railroad regulation to demonstrate the railroad worker's significantly diminished expectation of privacy.¹⁵

In a nutshell, petitioners maintain that the closely and historically pervasive regulated nature of the transportation industry has so diminished the regulatee/employee's expectation of privacy, that his reasonable expectation of freedom from randomized search and seizure of his personal bodily fluids ought be little greater than that of his employer regard-

14. As stated in *United States v. Biswell*, 406 U.S. 311 (1972), "where...regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." *Ibid*, at 318. "These decisions make it clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S. 594, 601 (1981).

15. Pet. Brief 25-30, citing *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.) cert. denied 479 U.S. 986 (1986) (applying administrative search exception to drug testing for race track employees); *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (applying administrative search exception to drug testing of nuclear plant engineers).

ing his commercial property.¹⁶ (Pet. Brief 25-30). Further, petitioners would bootstrap the exception, by asserting their own regulations, adopted under the informal rulemaking process prescribed by the Administrative Procedure Act, 5 U.S.C. §§ 553(b), and without any Congressional participation, have the same legitimate substitute value as a Congressional statute, for Fourth Amendment purposes. AOPA submits that neither contention is tenable.

As opposed to mere commercial property, "even the limited search of a person is a substantial invasion of privacy." *New Jersey v. T.L.O.*, 469 U.S. at 338 (1985). In recently discussing the reasonableness of the employee's expectation in the workplace, the Court made an important observation:

"Not everything that passes through the confines of the business address can be considered part of the workplace context, however....[e.g.,] closed luggage...a handbag, or briefcase each workday. While whatever expectation of privacy the employee has in the existence and outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within an employer's business address." *O'Connor v. Ortega*,

16. See, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor dealer's minimal expectation of privacy regarding nonforcable federal inspection of locked storeroom); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms dealer's minimal expectation of privacy regarding federal inspection of his locked storeroom during business hours under Gun Control Act); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mine operator's minimal expectation of privacy regarding federal inspection of its quarries under Mine Safety and Health Act).

No. 85-530 (Mar. 31, 1987) 105 S.Ct. 1492 at 1497.

The Court in *O'Connor v. Ortega* rejected the assertions of the petitioners therein, mirrored by those of petitioners herein, that employees have no reasonable expectation of privacy in the workplace. The Court recognized and declared such a right with regard to an employee's desk and file cabinets, and again required individualized suspicion as a constitutional prerequisite for any search of such areas of the workplace. *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 105 S.Ct 1492 at 1498-1503. That the employee has a considerably greater objective expectation of privacy in his body and bodily fluids than in his desk and file cabinets is not an unreasonable notion.

While this court has held that, within certain limited contexts, individuals such as prisoners have no legitimate expectation of privacy, *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court observed in *T.L.O.*, "we are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-340 (1985).

Unless the Court is now prepared to equate commercially-employed transportation personnel with convicted prisoners for Fourth Amendment purposes, as petitioners herein effectively would argue, petitioner's suggestion that the "administrative search" doctrine rationalizes the constitutionality of the FRA regulations at issue must be rejected.

Moreover, the regulatory statutes prescribing commercial property inspections carefully crafted by Congress, such as the Gun Control Act in *United States v. Biswell*, 406 U.S. 311 (1972), and the Mine Safety and Health Act in *Donovan v. Dewey*, 452 U.S. 594 (1981), constitute far different and more persuasive authority than the ad hoc regulations which virtually any federal agency, including those headed by petitioners herein, can informally impose under the Administrative Procedure Act with minimal notice and comment. See, 5 U.S.C. §§ 553(b), *et seq.*

AOPA submits that, were this Court to apply the "administrative search" exception to mandatory randomized drug testing prescribed by informally-adopted agency regulation, as petitioners herein have urged, virtually no Fourth Amendment protection would remain for any public or private employee within any agency-regulated activity. Such is particularly true in light of the substantial unfettered discretion and lack of constitutional safeguards associated with easily, casually, and unilaterally-promulgated agency regulations, concerning potentially any facet of the regulated environment. 5 U.S.C. §§ 553(b), *et seq.* The resulting potential for the well-intentioned, but expeditious agency abuse of important constitutional safeguards, based on any momentary but articulable policy goal, is manifest.

The very FAA NPRM cited by AOPA demonstrates how easily and with what little opportunity for full participation and comment, an agency such as the FAA or Department of Transportation can impose such sweeping regulations on potentially hundreds of thousands of Americans. Once this "Pandora's Box" is opened, there is no turning back. Much to its dismay, AOPA believes the mandatory, randomized drug testing provisions of the FAA's NPRM may be just the beginning, unless the Court herein acts to recognize and preserve the "individualized suspicion" prerequisite as the very essence of Fourth Amendment integrity.

Petitioners' suggestion that the "individualized suspicion" prerequisite be abandoned thus appears highly unwise. It would also appear to be totally unnecessary. AOPA believes the better view, in our modern transportation industry, is that an accident or incident of the type delineated within the FRA regulations, provides more than adequate suspicion of contribution by human factors, to meet to Fourth Amendment's "individualized suspicion" requirement for such intrusive, bodily searches. See, *United States v. Montoya De Hernandez*, 473 U.S. 531, 542-543 (1985).

CONCLUSION

In the more than 50 years in which it has been an integral part of the transportation safety dialogue, AOPA has witnessed the increasingly indiscriminate use of the "safety demands it" rationalization for virtually any regulatory proclamation, regardless of the proposed action's likelihood ever to address the targeted problem. Once again, petitioners have herein wielded the mammoth bludgeon of the public safety and morality, as the essential justification for these individually suspicionless, yet unprecedentedly intrusive invasions, of our most deeply-cherished notions of personal privacy. As Justice Brennan has so wisely observed:

If there is one enduring lesson in the struggle to balance individual rights against society's need to defend itself against lawlessness, it is that "[i]t is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly at the end." *United States v. Montoya De Hernandez*, 473 U.S. 531, 567 (1985) (Brennan, J., dissenting), citing *Davis v. United States*, 328 U.S. at 597 (1946) (Frankfurter, J., dissenting).

Moved by whatever momentary evil has aroused their fears, officials -- perhaps even supported by a majority of citizens -- may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone -- the most comprehensive of rights and the

right most valued by civilized men.' *New Jersey v. T.L.O.*, 469 U.S. 325, 362-363 (1985) (Brennan, J., dissenting) citing, *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

If the Fourth Amendment is to retain its significance and vitality within a free and civilized society, adoption of the "administrative search" exception for agency-promulgated drug testing represents a line which, as Justice Brennan has warned, we simply cannot afford to cross. Clearly, the Fourth Amendment was never intended to be held hostage, and all rights thereunder forfeited, as a *quid pro quo* for the commercial exercise of one's privileges under a certificate or license issued by an agency of the United States government.

Respectfully Submitted,

SCOTT D. RAPHAEL
LAW OFFICES OF SCOTT D.
RAPHAEL
1201 Dove Street, Suite 600
Newport Beach, CA. 92660
(714) 851-8950

In The
Supreme Court of the United States
October Term, 1988

JAMES H. BURNLEY, IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

On Writ of Certiorari to the United States
Court of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN
CIVIL LIBERTIES UNION, AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN CALIFORNIA, AND
AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS

JOHN A. POWELL
STEPHEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

JAMES D. HOLZHAUER*
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

**Counsel of Record*

HARVEY GROSSMAN
ROGER BALDWIN FOUNDATION
OF ACLU, INC.
20 East Jackson Boulevard
Chicago, IL 60604
(312) 427-7330

EDWARD M. CHEN
AMERICAN CIVIL LIBERTIES
UNION OF NORTHERN CALIFORNIA, INC.
1663 Mission Street, Suite 460
San Francisco, CA 94103
(415) 621-2493

TABLE OF CONTENTS

	Page
INTEREST OF <u>AMICI CURIAE</u>	1
STATEMENT.....	3
INTRODUCTION AND SUMMARY OF ARGUMENT...	9
ARGUMENT.....	16
I. THE BLOOD AND URINE TESTING REQUIRED AND AUTHORIZED BY THE FRA REGULATIONS VIOLATE THE FOURTH AMENDMENT.....	16
A. The Blood And Urine Tests Required By The FRA Regulations Constitute Searches Under The Fourth Amendment.....	20
B. The Tests Authorized By Subpart D Of The Regulations Also Constitute Searches Under The Fourth Amendment....	23
C. The Blood And Urine Testing Of Railway Employees In The Absence Of A Warrant Supported By Probable Cause Violates The Fourth Amendment....	27
D. The Blood And Urine Testing Is Unreasonable In The Absence Of Individ- ualized Suspicion.....	35

1. The Searches Are Not Justified At The Inception.....	37
2. The Searches Required And Authorized By The FRA Regulations Are Not Reasonably Related In Scope To The Circumstances Justifying Them.....	48
CONCLUSION	67

TABLE OF AUTHORITIES

<u>Cases</u>	Page
<u>Almeida-Sanchez v. United States</u> , 413 U.S. 266 (1973).....	58
<u>Bell v. Wolfish</u> , 441 U.S. 520 (1979).....	14
<u>Blum v. Yaretsky</u> , 457 U.S. 991 (1982).....	24
<u>Camara v. Municipal Court</u> , 387 U.S. 523 (1967).....	17, 18, 20, 60
<u>Capua v. City of Plainfield</u> , 643 F. Supp. 1507 (D.N.J. 1986).....	54
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443 (1971).....	11
<u>Communications Workers of America v. Beck</u> , 108 S. Ct. 2641 (1988).....	26
<u>Delaware v. Prouse</u> , 440 U.S. 648 (1979).....	<u>passim</u>
<u>Division 241 Amalgamated Transit Union v. Suscy</u> , 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976).....	21
<u>Everett v. Napier</u> , 833 F.2d 1507 (11th Cir. 1987).....	21
<u>Flagg Bros., Inc. v. Brooks</u> , 436 U.S. 149 (1978).....	24
<u>Hill v. NCAA</u> , No. 619209 (Cal. Super. Ct., Aug. 10, 1988).....	25

<u>Katz v. United States</u> , 389 U.S. 347 (1967).....	17
<u>Lovvorn v. City of Chattanooga</u> , 846 F.2d 1539 (6th Cir. 1988)....	21, 22
<u>Mancusi v. DeForte</u> , 392 U.S. 364 (1968).....	56
<u>McDonell v. Hunter</u> , 809 F.2d 1302 (8th Cir. 1987).....	21
<u>McDonell v. Hunter</u> , 612 F. Supp. 1122 (S.D. Iowa 1985), modified, 809 F.2d 1302 (8th Cir. 1987).....	13
<u>McKenzie v. Jones</u> , 833 F.2d 335 (D.C. Cir. 1987).....	21
<u>National Federation of Federal Employees v. Carlucci</u> , 680 F. Supp. 416 (D.D.C. 1988).....	32, 38
<u>National Treasury Employees Union v. Von Raab</u> , 816 F.2d 170 (5th Cir. 1987), cert. granted, 108 S. Ct. ____ (1988).....	passim
<u>New Jersey v. T.L.O.</u> , 469 U.S. 325 (1985).....	passim
<u>New York v. Belton</u> , 453 U.S. 454 (1981).....	18
<u>New York v. Burger</u> , 107 S. Ct. 2636 (1987).....	58, 60, 61
<u>O'Connor v. Ortega</u> , 107 S. Ct. 1492 (1987).....	passim

<u>Patchogue-Medford Congress of Teachers v. Board of Education</u> , 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).....	25, 46
<u>Policeman's Benevolent Assn. v. Township of Washington</u> , 850 F.2d 133 (3d Cir. 1988).....	21
<u>Railway Employees Dep't v. Hanson</u> , 351 U.S. 225 (1956).....	26
<u>Railway Labor Executives' Assn. v. Burnley</u> , 839 F.2d 575 (9th Cir. 1988).....	21, 51, 53
<u>Schmerber v. California</u> , 384 U.S. 757 (1966).....	passim
<u>Taylor v. O'Grady</u> , 669 F. Supp. 1422 (N.D. Ill. 1987)....	32, 43, 51, 63
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).....	19
<u>United States v. Guest</u> , 383 U.S. 745 (1966).....	24
<u>United States v. United States District Court</u> , 407 U.S. 297 (1971).....	18, 28
<u>Winston v. Lee</u> , 470 U.S. 753 (1985).....	38, 40, 63, 64
<u>Constitutional Provisions</u>	
U.S. Const. amend. iv.....	passim
<u>Executive Materials</u>	
23 Weekly Comp. Pres. Doc. 605 (May 30, 1987).....	11

23 Weekly Comp. Pres. Doc. 59
(Jan. 27, 1987).....11

22 Weekly Comp. Pres. Doc. 1040
(Aug. 4, 1986).....11

Regulations

49 C.F.R. §§ 219.201 to 219.309....passim

Miscellaneous

50 Fed. Reg. 31,550 (Aug. 2, 1985).....8

50 Fed. Reg. 31,552 (Aug. 2,
1985).....27, 43

50 Fed. Reg. 31,555 (Aug. 2,
1985).....6, 55

50 Fed. Reg. 31,556 (Aug. 2, 1985)....6,

Federal Railroad Admin., U.S. Dep't
of Transp., Field Manual
(1986).....6-7, 55, 62

Mason & McBay, Cannabis: Pharmacology
and Interpretation of Effects,
30 J. Forensic Sciences 615
(1985).....8, 42

New York Times, Oct. 31, 1986,
at 17.....10

Safire, "Frisking Each Other," New
York Times, March 14, 1986,
at 35.....15

Schwartz & Hawks, Laboratory Detection
of Marijuana Use, 254 J. Am. Med.
Assn. 788 (1985).....7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

No. 87-1555

JAMES H. BURNLEY, IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners

v.

RAILWAY LABOR EXECUTIVES'
ASSOCIATION, ET AL.,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF THE
AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA, INC.,
AND AMERICAN CIVIL LIBERTIES
UNION OF ILLINOIS
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The American Civil Liberties Union

("ACLU") is a nationwide, non-profit organization with over 250,000 members, dedicated to the protection and defense of the civil rights and civil liberties of all Americans. The ACLU has long been active in the defense of Fourth Amendment rights, having appeared before this Court as amicus in such recent Fourth Amendment cases as National Treasury Employees Union v. Von Raab, No. 86-1879 (now pending); O'Connor v. Ortega, 107 S. Ct. 1492 (1987); and New Jersey v. T.L.O., 469 U.S. 325 (1985). The ACLU of Northern California filed an amicus brief in the court of appeals below.

This case presents important Fourth Amendment issues arising from an unprecedented effort by the federal government to compel railway employers to require their employees to give blood, urine and breath samples and to test those samples for evidence of use of

alcohol or other legal or illegal drugs. The ACLU and its local affiliates around the United States (including the ACLU of Northern California and the ACLU of Illinois) have been and are counsel or amicus in numerous cases challenging government-ordered blood and urine testing programs. Accordingly, we believe that our involvement in and familiarity with the blood and urine testing field and the approaches taken by the lower courts will assist the Court in considering the issues presented by this case.^{1/}

STATEMENT

This case involves regulations of the Federal Railroad Administration ("FRA") that require railroads to take blood and urine samples from their

^{1/} The written consent of the parties to the filing of this brief have been filed with the Clerk.

employees and to test those samples for evidence of drug or alcohol use following certain train accidents and fatal incidents,^{2/} and that "authorize" the railroads to conduct urine and breath tests following certain accidents, incidents or rule violations.^{3/} Subpart C of the regulations requires railroads to take and test blood and urine samples from all members of the train and engine crew (as well as signalmen, dispatchers and other employees) following the accident or incident without regard to whether there is any reason to suspect the employees of drug or alcohol use, or of impairment, and without regard to whether, in light of his duties, an employee's actions could possibly be

^{2/} Subpart C of the FRA regulations, 49 C.F.R. §§219.201 to 219.213.

^{3/} Subpart D of the FRA regulations, 49 C.F.R. §§219.301 to 219.309.

responsible for the mishap. As an incident referred to in the record demonstrates, if a tornado strikes a train causing some cars to derail, all of the train's crew members--including ticket takers--will all have to undergo blood and urine testing for drug or alcohol use.^{4/} The regulations do not merely require, for example, testing of an engineer who ran through signals or operated "overspeed," or of a brakeman who failed to apply the train's brakes properly, they require the testing of the entire crew and all of the "covered employees," including those who could not possibly have done anything to cause the accident or incident.

The blood and urine sampling and testing required by the FRA regulations are invasive and potentially humiliating

^{4/} See Jt. App. 137-139, 163-168.

procedures. The blood test involves the insertion of a hypodermic needle into the employee and the drawing of a quantity of blood. The FRA acknowledges that this is an invasive procedure. 50 Fed. Reg. 31,556 (Aug. 2, 1985) ("drawing blood is invasive").

The urine testing procedure has enormous potential for humiliation. As the FRA stated in issuing its final rule, direct "observation of [urine] sample collection * * * is the most effective means of ensuring that the sample is that of the employee and has not been diluted." 50 Fed. Reg. 31,555 (Aug. 2, 1985). Accordingly, the FRA instructs (at 49 C.F.R. §219.205(a)) railroads to collect samples in compliance with its Field Manual, which provides:

The employee will take urine collection cup into a private area designated by the physician/technician (a restroom or examining room is preferred). Under direct observation by the physician/

technician, the employee will provide a urine specimen into the polystyrene cup. Employees must provide at least 60 ml of urine. Failure to provide a sufficient amount of urine may result in disciplinary action * * *.

Federal Railroad Admin., U.S. Dep't. of Transp., Field Manual D-5 (1986) (emphasis in original).

The blood and urine samples taken from the employees are then tested for the presence of alcohol and the metabolites of controlled substances.^{5/} Traces of marijuana and other controlled substances dissipate from the blood rather quickly, but metabolites of these substances remain and may be detected in urine for days, weeks, and sometimes months after the substance has been ingested.^{6/} As the FRA has acknowledged,

^{5/} See Jt. App. 196-199.

^{6/} See, e.g., Schwartz & Hawks, Laboratory Detection of Marijuana Use, 254 J. Am. Med. Assn. 788 (1985).

presence of these metabolites does not establish that the employee is impaired, but only that the employee ingested the substance in the past.^{7/} Nor is it at all clear, as petitioners imply, that blood test results can demonstrate impairment.^{8/} An employee who refuses to submit to a blood or urine test is disqualified from employment in any of the jobs covered by the regulations for a period of nine months, in addition to any disciplinary action the railroad may take.^{9/} If an employee tests positive, that employee may be fired and may be subject to criminal prosecution as

^{7/} 50 Fed. Reg. 31,550 (Aug. 2, 1985).

^{8/} See, e.g., Mason & McBay, Cannabis: Pharmacology and Interpretation of Effects, 30 J. Forensic Sciences 615 (1985).

^{9/} 49 C.F.R. §219.213(a). The nine-month disqualification precludes employment "by any railroad with notice of such disqualification."

well.^{10/}

The parties disagreed as to the factual predicate for this invasive new program. The district court and the court of appeals both "assumed the seriousness of the problem" without any specific factual findings. Pet. App. 7a. The court of appeals, reversing an award of summary judgment for the government, held "that intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment." Pet. App. 36a.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case and its companion,
National Treasury Employees Union v. Von

^{10/} See 18 U.S.C. §342.

Raab, arrive at this Court at a time of unprecedented national concern over the effect of alcohol and drug use on the well-being of the country and its people. The blood and urine testing programs involved in these cases are but two small elements of a national campaign by the federal government to combat drug use. The government sees employee blood and urine testing as the most efficient means of accomplishing its law enforcement objective. As former Attorney General Meese explained to the United States Chamber of Commerce, "since most Americans work 'the workplace can be the chokepoint' for halting drug abuse."^{11/} Drug testing of all employees to achieve a "drug-free workplace" is but one element of the government's six-part

^{11/} New York Times, Oct. 31, 1986, at 17.

antidrug offensive.^{12/}

The ACLU shares the government's concern over drug abuse, and understands how that concern could tempt law enforcement officials to promote the kind of testing programs that are now before this Court. But the ACLU also realizes that troubled times and difficult national problems may pose great dangers to the Bill of Rights. As this Court eloquently noted in Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971):

In time of unrest, whether caused by crime or racial conflict or fear of internal subversion, [the Fourth Amendment] and the values it represents may appear unrealistic or "extravagant" to some.

It is at such times that the greatest

^{12/} See National Campaign Against Drug Use, 23 Weekly Comp. Pres. Doc. 605 (May 30, 1987); The State of the Union, 23 Weekly Comp. Pres. Doc. 59, 76 (Jan. 27, 1987); National Campaign Against Drug Abuse, 22 Weekly Comp. Pres. Doc. 1040, 1041 (Aug. 4, 1986).

vigilance must be maintained to preserve the fundamental values enshrined in the Bill of Rights.

As serious as the problem of drug abuse may be, the "war on drugs" cannot be allowed to number among its casualties the Fourth Amendment. The government may understandably wish to search without probable cause or even reasonable suspicion in order to combat drug abuse, just as it might understandably wish to search to combat murder, rape, robbery and breaches of national security. As one federal court noted: "There is no doubt about it--searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make [a search] a constitutionally reasonable one."^{13/} The Fourth Amendment, as a general matter,

interferes with efficient government operations designed to promote important government and public interests. It does so to serve a higher value, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *."

Amici's principal concern in this case is the wide-ranging effect the Court's decision may have on Fourth Amendment doctrine generally, and on the constitutionality of suspicionless blood and urine testing particularly. We certainly agree with respondents that the testing program involved in this case is unconstitutional under any "balancing" test that may be used to determine the "reasonableness" of a warrantless

^{13/} McDonell v. Hunter, 612 F.Supp. 1122, 1130 (S.D. Iowa 1985), modified, 809 F.2d 1302 (8th Cir. 1987).

search. But we also believe that this is not a case in which such a "balancing test" should be substituted for the explicit constitutional requirement of a warrant and probable cause.

Moreover, amici find it difficult to see how any decision that upholds the blood and urine testing program involved in this case could be limited so as not to weaken the structure of the Fourth Amendment and to change the very nature of the relationship between the people of this country and law enforcement officials. This is not a case that can be limited to students,^{14/} or to prisoners,^{15/} or even to federal employees involved in enforcing the drug laws.^{16/} It involves private sector

^{14/} See New Jersey v. T.L.O., 469 U.S. 325, 348-350 (Powell, J., concurring).

^{15/} See Bell v. Wolfish, 441 U.S. 520 (1979).
(Cont'd)

employees who certainly possess the full range of constitutional rights, and who do not shed their reasonable expectation of privacy at the workplace gate. O'Connor v. Ortega, 107 S. Ct. 1492, 1498 (1987). If the federal government can compel the railroads to administer blood and urine tests on these private employees in the absence of any particularized suspicion at all without violating the Fourth Amendment, it is difficult to see who would not be subject to forced, suspicionless testing.^{17/}

^{16/} See National Treasury Employees Union v. Von Raab, No. 86-1879 (now pending). In citing these cases, amici certainly do not imply any agreement that students, prisoners, or federal employees enjoy reduced constitutional rights.

^{17/} See Safire, "Frisking Each Other," New York Times, March 14, 1986, at 35.

ARGUMENT

I. THE BLOOD AND URINE TESTING
REQUIRED AND AUTHORIZED BY THE
FRA REGULATIONS VIOLATE THE
FOURTH AMENDMENT

The FRA regulations require railroads to search their employees for evidence of drug or alcohol use in the absence of any reason to believe that such evidence will be found.^{18/} The obvious threshold question presented by this case is thus whether there is any sufficient reason why the government should not be required to comply with the express textual command of the Fourth Amendment, i.e., to obtain a warrant based upon probable cause. The Fourth Amendment ensures "[t]he right of the people to be secure in their persons,

^{18/} For the most part, we will refer to the mandatory blood and urine tests as searches. To the extent they require employees to turn over bodily fluids, the tests are certainly seizures as well.

houses, papers, and effects against unreasonable searches and seizures." "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). It "protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

Whether government conduct constitutes a search or seizure--i.e., whether the Fourth Amendment applies in a given case--depends upon whether the search intrudes upon the individual's "reasonable expectation of privacy." Katz v. United States, 389 U.S. at 360-361 (Harlan, J., concurring). Once it is determined that the Fourth Amendment does apply, "except in certain carefully defined classes of cases," Camara v.

Municipal Court, 387 U.S. at 528, the search must be authorized by a warrant based upon probable cause. New Jersey v. T.L.O., 469 U.S. at 340; New York v. Belton, 453 U.S. 454, 457 (1981); United States v. United States District Court, 407 U.S. 297, 315 (1971); Camara v. Municipal Court, 387 U.S. at 528-529.

This Court has permitted limited exceptions to the express requirements of the warrant clause only in those "exceptional circumstances when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable". O'Connor v. Ortega, 107 S. Ct. at 1500; Id. at 1506 (Scalia, J., concurring) New Jersey v. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring). In those exceptional cases, the search must be "justified at its inception" and must at a minimum be "reasonably related

in scope to the circumstances which justified the interference in the first place." New Jersey v. T.L.O., 469 U.S. at 341. And, in nearly all cases, and particularly where searches of a "personal nature" are involved, the search must be based on some reasonable degree of individualized suspicion. "Exceptions to the requirement of individual suspicion are generally appropriate only where the privacy interests implicated are minimal." Id., at 342 n.8.

As this Court has repeatedly recognized, privacy interests are never minimal when searches of the person are involved. "[E]ven a limited search of the person is a substantial invasion of privacy." New Jersey v. T.L.O., 469 U.S. at 337. See also Terry v. Ohio, 392 U.S. 1, 24-25 (1968). ("[e]ven a limited search of the outer clothing for weapons

constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience"). See also Camara v. Municipal Court, 387 U.S. at 537 (reduced degree of suspicion acceptable because housing inspections are not "personal in nature").

A. The Blood And Urine Tests Required By The FRA Regulations Constitute Searches Under The Fourth Amendment

The initial inquiry required in this case--whether the blood and urine testing required by the FRA regulations constitutes a search and seizure within the meaning of the Fourth Amendment--is not a difficult one. This Court has previously held that the compelled taking and testing of a person's blood implicates the "interests in human dignity and privacy which the Fourth Amendment protects" and is a search and

seizure. Schmerber v. California, 384 U.S. 757, 769-70 (1966). And all of the federal courts to address the question have held that compelled urine testing also comes within the Fourth Amendment's protection.^{19/}

Considering the potentially humiliating nature of urine testing, and the vast array of "personal physiological secrets" that urine may hold (National Treasury Employees Union v. Von Raab, 816

^{19/} See, e.g., McKenzie v. Jones, 833 F.2d 335, 338 (D.C. Cir. 1987); Policeman's Benevolent Assn. v. Township of Washington, 850 F.2d 133, 135 (3d Cir. 1988); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 176 (5th Cir. 1987); Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1542 (6th Cir. 1988); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266-67 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987); Railway Labor Executives' Assn. v. Burnley, 839 F.2d 575, 580 (9th Cir. 1988); Everett v. Napier, 833 F.2d 1507, 1509 (11th Cir. 1987).

F.2d at 175), the lower courts are clearly correct in agreeing that urine testing constitutes a search. In the words of the Sixth Circuit, "[t]o hold otherwise would leave the government unrestrained in requiring urinalysis. We do not believe society would sanction a grant of power to the government that would have the effect of enabling the government to require a urine test of any individual it had legally stopped, even if it had no reasonable suspicion of drug usage. Such an approach would eviscerate the protections of the fourth amendment." Lovvorn v. City of Chattanooga, 846 F.2d at 1542.

Petitioners concede that the blood and urine testing required under Subpart C of the FRA regulations constitute a Fourth Amendment search. Petitioners' Brief at 24-25 n.26.

B. The Tests Authorized By Subpart D Of The Regulations Also Constitute Searches Under The Fourth Amendment

Subpart D of the FRA Regulations authorize railroads to carry out urine and breath tests under certain circumstances. Petitioners argue that these regulations do not involve sufficient state action to come within the Fourth Amendment at all. Petitioners' Brief at 24-25 n.26.20/ The district court and the court of appeals both disagreed.

Although we agree that purely private action does not come within the Fourth Amendment, when the government actively encourages the private action and removes existing legal and

20/ Petitioners concede that if the urine and breath testing authorized by Subpart D is regarded as state action, it constitutes a search under the Fourth Amendment. Ibid.

contractual impediments in the way of the private action, the line between purely private action and state action has been crossed. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-165 (1978). The FRA, in Subpart D of its regulations, has established the authority of the railroads to test, and has specified in great detail the circumstances under which testing can occur and the testing procedures. The government involvement in Subpart D testing is thus a good deal more than "peripheral" and meets the requirements for state action. United States v. Guest, 383 U.S. 745, 755-56 (1966).

Moreover, as petitioners acknowledge, Subpart D of the FRA regulations goes well beyond merely authorizing the railways to conduct urine and breath tests. The regulations expressly pre-

empt any state or local laws that would limit the rights of railroads to engage in such testing. See 49 C.F.R. §219.13(a). Several states have enacted laws regulating blood and urine testing,^{21/} and some state courts have held that private sector blood and urine testing violates state constitutional and statutory protections.^{22/} In those states, railroads are "authorized" by federal law to disregard state law and to proceed with testing pursuant to Subpart D. Those railroads act with the imprimatur of the federal law. From the perspective of the employees who are

^{21/} See, e.g., Mont. Code Ann. §39-2-304 (1987); R.I. Gen. Laws §28-6.5-1 (Supp. 1987); Vt. Stat. Ann. tit. 21, §§511-520 (1987).

^{22/} See, e.g., Hill v. NCAA, No. 619209 (Cal. Super. Ct., Aug. 10, 1988); Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S. 2d 456 (1987).

subjected to testing under Subpart D (and who could not otherwise, under state law, be tested), the federal regulations are "the source of the power and authority by which [their] rights are lost or sacrificed." Railway Employees Dep't. v. Hanson, 351 U.S. 225, 232 (1956). See also, Communication Workers of America v. Beck, 108 S. Ct. 2641, 2656-2657 (1988).

In addition to pre-empting state laws that would prohibit or limit urine testing by employees, the FRA regulations strongly encourage testing by removing contractual barriers to testing and by relieving the railroads of their obligation to obtain the agreement of their unions before testing. As the FRA acknowledges, Subpart D "supersedes any provision of a collective bargaining agreement, or arbitration award construing such an agreement * * * ." 50 Fed. Reg. 31, 552.23/

As the FRA thus makes clear, Subpart D strongly encourages the railroads to engage in urine testing and removes substantial legal and contractual impediments to testing. Under the circumstances, there can be little doubt that Subpart D involves state action.

**C. The Blood And Urine Testing Of
Railway Employees In The Absence
Of A Warrant Supported By Probable
Cause Violates The Fourth
Amendment**

The Fourth Amendment begins by prohibiting "unreasonable searches and seizures," but it goes on to define reasonableness: a search or seizure is reasonable when it is authorized by a

23/ The FRA further acknowledged in promulgating the regulations that:

It is not reasonable to believe that the railroads will be able to make significant strides in addressing alcohol and drug use without the encouragement and tools provided by regulations.

50 Fed. Reg. 31, 528 (Aug. 2, 1985) (emphasis added).

warrant based upon probable cause.

United States v. United States District Court, 407 U.S. at 315. Without a warrant and probable cause, searches are "per se unreasonable * * * subject only to a few specifically established and well-delineated exemptions." Katz v. United States, 389 U.S. 347, 357 (1967).

Petitioners would stand the Fourth Amendment on its head, and make "reasonableness" (determined by "balancing") the norm, and warrants supported by probable cause the narrow exception required only in certain criminal cases. Their interpretation would equate the Fourth Amendment with a meager requirement that the government engage in cost-benefit analysis whenever it wants to search. If the benefit the government claims would be reaped by the search outweighs the costs to the individual subjected to the search, the

government action is reasonable and thus constitutional. This kind of cost-benefit analysis may be in vogue today, but the Framers of the Bill of Rights precluded that approach.

Contrary to petitioners' argument, "the Amendment does not leave the reasonableness of most [searches] to the judgment of the courts or government officers; the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause." New Jersey v. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring).

This Court has not embraced the balancing approach as the touchstone for the Fourth Amendment. To the contrary, it has limited exceptions to the express requirements of the Fourth Amendment to those "exceptional circumstances when

special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." O'Connor v. Ortega, 107 S. Ct. at 1500; Id. at 1506 (Scalia, J., concurring); New Jersey v. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring).^{24/} "Impracticable" does not mean inconvenient; it means "incapable of being performed or accomplished by the means employed or at command." Webster's Third International Dictionary (1971).

In this case, the government has failed to meet its burden of demonstrating that either of the express

^{24/} We examine those "exceptional circumstances" more fully in the Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Louisiana filed in National Treasury Employees Union v. Van Raab (No. 86-1879) at pp. 12-15. As we demonstrate infra, the finding in O'Connor that there were exceptional circumstances does not apply in this case. See also our Von Raab brief at 18-19.

requirements of the Fourth Amendment--a warrant or probable cause--would be impracticable. As far as the warrant requirement is concerned, as the Court held in Schmerber v. California, it may be impracticable to require a warrant before a blood sample can be seized, but given the length of time drug metabolites persist in urine it would not be at all impracticable to require a warrant before urine samples may be seized. Nor would it be impracticable to require a warrant before the blood or urine samples are searched (i.e., tested) for evidence of alcohol or drug use. Once body fluids are removed from the body, any evidence of drug or alcohol use can be preserved by proper handling and storage of the fluids. The actual testing--the revelation of the physiological secrets contained in the urine--can wait until the government obtains a warrant.

As far as the second requirement of the Fourth Amendment, probable cause, is concerned, there is absolutely no reason why it would be impracticable to require probable cause before testing employees. Numerous studies and field evaluations have demonstrated that nonintrusive field sobriety and neurobehavioral tests can be used to establish probable cause to believe that an individual is impaired due to alcohol or drug use. See Jt. App. at 173-184 (describing Los Angeles Police Department's successful program for detecting drug or alcohol impairment); National Federation of Federal Employees v. Carlucci, 680 F. Supp. 416, 429-430 (D.D.C. 1988) (describing alternatives to urinalysis); Taylor v. O'Grady, 669 F. Supp. 1422, 1431-33 (N.D. Ill. 1987) (same).

In addition, the government has not

shown that it would be impracticable to await the results of prompt accident investigations that would determine whether the impairment of particular employees was--or could have been--responsible for the accident, incident or rule violation. In Schmerber, the Court made it quite clear that a blood sample could be taken only after a preliminary investigation gave the police officer probable cause to believe the motorist was intoxicated. The FRA regulations, in effect, would substitute the search for the preliminary investigation. The government seems to be arguing that because it would be easier to search than to conduct a prompt investigation, probable cause should not be required. But the Fourth Amendment prohibits such shortcuts.

The government has not shown that this case presents any of the

"exceptional circumstances [that] * * * make the warrant and probable cause requirement impracticable." Petitioners simply would like to search without a warrant and without probable cause because that would make their governmental objectives easier to accomplish. There is no doubt that the warrant and probable cause requirements of the Fourth Amendment often make it more difficult for the government to accomplish its objectives. But that is a cost we must incur to protect the important values that are reflected in the Fourth Amendment.^{25/}

^{25/} In light of the fact that the courts below did not fully examine the question of whether a warrant and probable cause would be impracticable, if this Court does reverse the judgment of the court of appeals (and we urge the Court not to do so), the Court should at least remand the case for further factual development on the practicality of requiring probable cause and a warrant.

D. The Blood And Urine Testing Is Unreasonable In The Absence Of Individualized Suspicion

As we demonstrate above, the highly intrusive searches required by the FRA regulations should not be permitted unless the government complies with the express terms of the Fourth Amendment and obtains a warrant based upon probable cause. But even if the Court were to adopt the reasonableness/balancing approach advocated by petitioners and employed by the court of appeals below, the FRA regulations, which mandate intrusive personal searches without any showing of individualized suspicion whatsoever, should still be held unconstitutional.

In cases falling within those "few specifically established and well-delineated exceptions" where the balancing approach is appropriate, this Court has required a balancing of the

public interest necessitating the search against the invasion of individual privacy that the search entails.

O'Connor v. Ortega, 107 S. Ct. at 1499;

New Jersey v. T.L.O., 469 U.S. at 337.

Although there is no fixed standard of reasonableness, it is clear that the search must be both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." New Jersey v. T.L.O., 469 U.S. at 341.

This Court has never found a search as intrusive as those involved in this case to be "justified at its inception" without a high degree of individualized suspicion. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal and where 'other

safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field.'" New Jersey v. T.L.O., 469 U.S. at 342 n.8 (quoting Delaware v. Prouse, 440 U.S. at 654-655).

In this case, the government has failed to demonstrate that its searches are either justified at their inception or reasonably related in scope to the circumstances justifying them.

1. The Searches Are Not Justified At Their Inception

The FRA regulations require employers to conduct extraordinarily intrusive searches without any individualized suspicion (reasonable or otherwise) that the employees searched have used alcohol or drugs or that employee impairment played (or could have played) any role whatsoever in the accident, incident or rule violation. As petitioners seem to

acknowledge, a suspicionless search as intrusive as those involved in this case is justified at its inception only when necessary to serve the compelling government interests. Winston v. Lee, 470 U.S. 766-767 (1985). See also New Jersey v. T.L.O., 469 U.S. at 343 ("the reasonableness standard should ensure that [individual interests] will be invaded no more than is necessary to achieve" the government objective).^{26/}

In support of their assertion that the FRA regulations are necessary to serve "compelling" government interests, petitioners point to the long history of government concern with railroad safety

^{26/} See Petitioners' Brief at 36 (arguing that "the FRA regulations serve compelling governmental interests"). See also National Federation of Federal Employees v. Carlucci, 680 F. Supp. 416, 431 (D.D.C. 1988) (government must establish "compelling need" for suspicionless testing).

and to the FRA's own, largely conclusory testimony that drug abuse has had a substantial impact on railroad safety. If that would suffice, a warrant and probable cause (or even reasonable suspicion) would never be required: certainly the government has at least an equally substantial interest in apprehending murderers, rapists, kidnappers and thieves (and in deterring others from such conduct); an even larger and more pervasive history of government concern with crime; and solid evidence of the negative impact of crime. There are many long-standing, compelling government interests, including crime control, regulation of morality and prevention of breaches of national security. If the invocation of such interests, with little more, could justify suspicionless searches, the Fourth Amendment would become meaningless.

To justify the highly intrusive, suspicionless searches required by the FRA regulations, the government must do more than merely assert a substantial government interest. It must show that unless it is permitted to conduct the search in the manner it proposes it will be unable to reasonably accomplish the government purpose. In other words, the government must show that the intrusion on Fourth Amendment interests is "no more than is necessary to achieve" its objectives. New Jersey v. T.L.O., 469 U.S. at 343. See also Winston v. Lee, 470 U.S. at 766-767. Petitioners have failed to meet that burden.

Petitioners' claim, put in constitutional terms, is that the government interest in railroad safety cannot reasonably be accomplished unless all of the members of a train's crew (as well as switchmen, dispatchers, signalmen

and other "covered employees") are subjected to blood and urine tests whenever a substantial accident, incident or rule violation occurs. In order to serve the government interest, petitioners claim, the blood and urine samples must be taken and tested even when there is no suspicion (reasonable or otherwise) that any action or omission of the particular employee caused or contributed to the mishap, and even when there is no suspicion that the impairment or malperformance of any employee played (or could have played) any role in the accident. As the record shows, when a tornado hits a train, all crew members--including ticket collectors--are subject to blood and urine testing. Jt. App. at 163-168.

Petitioners completely fail to support their claim that the FRA regulations invade Fourth Amendment

interests "no more than is necessary to achieve" their objectives. New Jersey v. T.L.O., 469 U.S. at 343.^{27/} They argue, without citing any substantial, objective evidence, that employees impaired by drugs or alcohol may show no outward signs of impairment that would give rise to reasonable suspicion.^{28/} To the contrary, the record indicates that supervisors or investigators can be

^{27/} Where this Court has upheld suspicionless searches, it has found less intrusive alternatives (e.g. searches based on reasonable suspicion) impracticable. See United States v. Villamonte-Marquez, 462 U.S. 579, 589 (1983); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976); Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

^{28/} Petitioners' argument that testing is needed because it is otherwise difficult to detect impairment also ignores the fact testing blood and urine for the metabolites of drugs does not measure or demonstrate impairment. See 50 Fed. Reg. 31,500 (Aug. 2, 1985); Mason & McBay, Cannabis: Pharmacology and Interpretation of Effects, 30 J. Forensic Sciences 615 (1985).

trained to effectively detect employees who are impaired by drug or alcohol use without resort to such intrusive procedures as blood and urine testing. Jt.App. 173-184. See also Taylor v. O'Grady, 622 F. Supp. at 1431-1433. The FRA has even acknowledged that "supervisors can observe performance and judge whether it is up to standard." 50 Fed. Reg. 31,552 (Aug. 2, 1985). If promoting safety by detecting employee impairment is the government's interest, that interest can be served directly with far less intrusion upon Fourth Amendment interests. Any "incremental contribution to [railroad] safety" afforded by the invasive searches required by the FRA regulations hardly "justifies the [intrusive] practice under the Fourth Amendment" Delaware v. Prouse, 440 U.S. at 659.

In addition, even if it were true

that employee impairment might be hard to detect in some cases (and we dispute that), that would hardly justify a program that requires blood and urine testing in the absence of any evidence or suspicion that the impairment of a particular employee or group of employees caused or could have caused the accident, incident or rule violation. The fact that a few violators may go undetected has never been regarded as sufficient justification for a sweeping dragnet search like that petitioners propose. See, e.g., Delaware v. Prouse. One of the accepted costs of the Fourth Amendment is that some wrongdoers will evade detection. Petitioners' speculative claim that an uncertain percentage of alcohol or drug users may slip by hardly justifies engaging in an intrusive dragnet search of all employees without any reason to suspect them of

drug or alcohol use.

Petitioners also advance the related claim that suspicionless testing is needed to deter railroad employees from drug or alcohol abuse. To begin with, it is difficult to believe that the possibility of blood and urine testing following such a remote, irregular and uncertain event as a train accident will effectively deter employees who are not already deterred by the possibility of criminal penalties for drug use or by personal safety and health concerns. Nor is there any showing that suspicion-based testing does not adequately deter drug use. But even if such testing would deter some illegal drug use--and that seems very doubtful--that would not be enough to overcome the Fourth Amendment. Random searches of homes for contraband would deter much illegal activity. Similarly, random searches of

persons on the street would deter possession (and use) of illegal weapons and drugs. Dragnet searches are effective in intimidating the populace into complying with the law. As the New York Court of Appeals recently stated, "[i]f random searches of those apparently above suspicion were not effective, there would be little need to place constitutional limits upon the government's power to do so." Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d at 70. Suspicionless searches may deter illegal activity, but the cost of that deterrence in terms of human dignity and freedom is one the Framers of the Fourth Amendment found to be too great. The Fourth Amendment stands squarely for the proposition that suspicionless searches are not reasonably necessary to serve the governmental interest in deterring illegal activity.

To allow the government to require railroad employees to undergo blood and urine tests in the absence of any reasonable suspicion might very well be the first step toward a more comprehensive program of regular testing that would effectively deter drug and alcohol abuse. The government interest in safety and unimpaired performance does not begin and end with the railroads, however. Under the petitioners' rationale, for example, all motorists or pedestrians involved in "accidents, incidents or certain rule violations" could certainly be tested for drug or alcohol use, Schmerber v. California notwithstanding. Petitioners' rationale would also justify wholesale blood and urine testing of the entire working population, since workplace safety is an important, longstanding government interest. In fact, petitioners' rationale has no

effective limits, and would justify wholesale blood and urine testing of the entire population, not based on any reasonable suspicion, but based on a desire to deter wrongdoing. Such a law enforcement shortcut would fundamentally change the nature of our society and is a measure the Fourth Amendment does not, and this Court cannot, allow.

2. The Searches Required And Authorized By The FRA Regulations Are Not Reasonably Related In Scope To The Circumstances Justifying Them.

In addition to not being justified at their inception, the searches required and authorized by the FRA regulations are not reasonably related in scope to the circumstances that might justify them. These searches are highly intrusive, and are certainly not "sufficiently productive mechanism[s] to justify the intrusion on Fourth Amendment interests." Delaware v. Prouse, 440 U.S.

at 659.

The FRA regulations require the railroads to take blood and urine samples from employees following certain accidents, incidents and rule violations. This testing is highly intrusive in two respects: the sampling itself intrudes upon personal, bodily integrity, and the testing of the samples allows the railroad and the government to peer into the private and personal lives of employees.

This Court acknowledged the high degree of intrusion upon "fundamental human interests" involved in taking a blood sample in Schmerber v. California. The Court noted that exigent circumstances that may ordinarily justify searches of persons without probable cause "have little applicability with respect to searches involving intrusions beyond the body's surface. The interests

of human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." 384 U.S. at 769-770. The Court, noting that "[t]he integrity of an individual's person is a cherished value of our society," permitted blood sampling based upon probable cause and only "under stringently limited conditions * * *." Id. at 772.

Requiring employees to give urine samples is similarly invasive. The act of urination is a peculiarly private bodily function, one that is not normally done in the presence of others. As the Fifth Circuit noted in Von Raab:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a private function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social

custom.

816 F.2d at 175. As the court of appeals below held, requiring employees to give urine samples "offend[s] human dignity and privacy and [is] degrading." Pet. App. 22a.

The potential for degradation and humiliation is greatest when the testing procedure requires direct observation of the act of urination. See, e.g., Taylor v. O'Grady, 669 F. Supp. at 1434 ("McNeal [an employee required to produce a urine sample under direct observation] testified that her experience was humiliating and hateful. I [Judge Getzendanner] found it painful to listen to her testimony when it was so obvious how embarrassing it was for her, both at the time of the test and when relating it publicly in the courtroom before me"). But, as the FRA acknowledged, direct "observation of urine sample collection

* * * is the most effective means of ensuring that the sample is that of the employee and has not been diluted." 50 Fed. Reg. 31,555 (Aug. 2, 1985).

Therefore, the FRA regulations require the railroads to comply with the procedures set forth in the FRA Field Manual, which in turn require the employee to urinate into a small cup "[u]nder direct observation by the physician/technician * * *." FRA Field Manual D-5 (emphasis in original).

Obviously such a procedure has enormous potential for degradation, humiliation and embarrassment. Petitioners' assertions to the contrary simply ignore human nature and reality.

In addition to involving invasive and degrading procedures, blood and urine testing provides the government with a window into the private, personal, off-duty lives of railroad employees. Not

only does the testing allow the government to monitor the off-duty use of alcohol and other drugs of abuse by railroad employees which may have occurred days or weeks before and may have no effect on job performance (see Court of Appeals opinion, 839 F.2d at 589) but it also reveals the use of legal drugs and may allow the government to learn of private and personal medical conditions for which those drugs are used. For example, testing can reveal the use of antidepressants and other drugs used to treat mental or psychological disorders. It can also reveal medical conditions such as pregnancy. As the Fifth Circuit noted in Von Raab, "even the individual who willingly urinates in the presence of another does not 'reasonably expect to discharge urine under circumstances making . . . discover[y of] the personal

physiological secrets it holds' possible." 816 F.2d at 175 (quoting from Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986)). Contrary to petitioners' assertion (Brief at 32), the FRA regulations do not prohibit testing for substances other than alcohol and drugs of abuse.

In an attempt to counter the strong evidence and the prior court determinations that blood and urine tests are intrusive and invasive personal searches, petitioners claim that the FRA regulations involve only a minimal intrusion on railway employees' expectation of privacy for three reasons: 1) the tests are conducted as an aspect of the employment relationship; 2) the discretion of government officers is limited; and 3) the testing procedures are narrowly tailored to protect privacy. None of these claims survive

close scrutiny, however.

To begin with, the requirement of drug and alcohol tests is not imposed by employers, but by the government. In this respect petitioners' argument amounts to nothing less than a claim that the government can avoid the full thrust of the Fourth Amendment by deputizing employers to conduct suspicionless searches. The rental housing market is heavily regulated in many states and cities (e.g., subject to rent control, stringent health and safety requirements and periodic inspections). Would the government argue that it could enact regulations requiring landlords to search apartments for evidence of drug use or other illegal activity on the grounds that renters have a reduced expectation of privacy in the landlord-tenant relationship? See O'Connor v. Ortega, 107 S. Ct. at 1505 (Scalia, J.,

concurring in the judgment); Mancusi v. DeForte, 392 U.S. 364 (1968).

Petitioners rely on O'Connor v. Ortega for the proposition that employees have a reduced expectation of privacy in the workplace. But both the nature of the government interest and the extent of the intrusion on individual interests were so different in that case as to be of little instructive value here. In O'Connor, the Court reasoned that government employers regularly need to enter the offices, desks and file cabinets of their employees "for legitimate work-related reasons wholly unrelated to illegal conduct." Thus, requiring a warrant and probable cause in such circumstances "would seriously disrupt the routine conduct of business and would be unduly burdensome." 107 S. Ct. at 1500. Examining employees' blood and urine can hardly be viewed as a

routine work-related event, like entering an office or looking for a file. Moreover, O'Connor did not approve even that less-intrusive search without individualized suspicion. It certainly cannot be said in this case that requiring reasonable, individualized suspicion before conducting blood and urine tests "would seriously disrupt the routine conduct of business." Furthermore, O'Connor did not involve searches of the person, and the Court emphasized the "'relatively limited invasion' of employee privacy. * * * The employee may avoid exposing personal belongings at work by simply leaving them at home." 107 S. Ct. at 1502. Certainly in this case the employees do not have a similar option of leaving their blood or urine at home (or in their bodies).

Petitioners also cite New York v. Burger, 107 S. Ct. 2636 (1987), and

Almeida-Sanchez v. United States, 413 U.S. 266 (1973), for the proposition that "persons who work in such 'closely regulated' industries have a 'reduced expectation of privacy' and 'in effect consent[] to the restrictions placed upon [them].'" Pet. Brief at 26. We find that patched-together quotation totally disingenuous. Neither of those cases involved or even discussed searches of workers employed in closely regulated industries. The fact that railroads are regulated does not mean that railroad employees are heavily regulated or have a diminished expectation of privacy. Indeed, this Court has never held that the "closely regulated industries" doctrine applies to searches of persons.

Petitioners' next argument--that the intrusion on individual privacy is minimal because the regulations give officials little discretion--is factually

mistaken and legally misplaced. As a factual matter, the regulations appear to give officials substantial discretion. Under Subpart C of the regulations, a railroad representative may exclude an employee from testing if he "can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident." 49 C.F.R. §219.203(a)(3)(i). Decisions of railroad representatives will be upheld if made in "good faith." 49 C.F.R. §219.201(c). These rules taken together obviously give railroad representatives enormous discretion particularly in borderline cases, discretion that can be used to engage in fishing expeditions, or to punish or harass disfavored employees. Railroad officials have even greater discretion under Subpart D, which authorizes--but does not require--them to

search under given circumstances. In those cases, officials have nearly complete discretion.

More importantly, the degree of official discretion (i.e., the "certainty and regularity" of the inspection; New York v. Burger, 107 S. Ct. at 2644) is not a factor to be included in the balancing process by which the degree of suspicion required to justify the search is assessed. Instead, it is a factor to be considered in deciding whether the usual requirement of a warrant can be disregarded. In Camara v. Municipal Court, the Court made it quite clear that the issue of official discretion is one that goes to the warrant requirement:

The practical effect of [the present] system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

387 U.S. 532-33. Similarly, the passage from Delaware v. Prouse cited by petitioners spoke of safeguards, such as warrants, that are needed to cabin official discretion. 440 U.S. 653-654. See also New York v. Burger, 107 S. Ct. at 2644 (holding that "limit[ing] the discretion of the inspecting officers" is one of the "two basic functions of a warrant.")

Finally, petitioners argue that the intrusion upon employee privacy is minimal because the blood and urine tests are narrowly tailored to protect privacy. Even if it were true, as petitioners assert, that the intrusiveness of the blood and urine testing procedures has been reduced as much as possible, they still remain, by their nature, highly intrusive, invasive and degrading procedures. As this Court has noted, "even a limited search of a

person is a substantial invasion of privacy." New Jersey v. T.L.O., 469 U.S. at 337. The taking of a blood sample will always involve a physical invasion of bodily integrity. "The integrity of an individual's person is a cherished value of our society." Schmerber v. California, 384 U.S. at 772. Urine sampling, to be reliable and useful, will always involve performing a very private act under a degree of supervision guaranteed to humiliate the average person. Under the procedures required by the FRA regulations and the Field Manual, employees have to urinate in a small cup "[u]nder direct observation of a physician/technician." FRA Field Manual D-5. The potential for embarrassment and humiliation inherent in such a procedure is manifest. See, e.g., Taylor v. O'Grady, 669 F. Supp. at 1433-1435. And the bodily fluids will always contain

"physiological secrets" that the railroad, the government, the medical facility, or even the public at large may learn. To call these procedures a "minimal" invasion of privacy is to ignore reality.

Petitioners cite repeatedly to Schmerber v. California and Winston v. Lee for the proposition that blood testing is not a "substantially intrusive procedure." What they fail to emphasize is that in Schmerber the Court allowed a blood test only upon a showing of probable cause and emphasized that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that the desired evidence may be obtained." 384 U.S. at 769. Similarly, in Winston v. Lee the Court held that even with probable cause and a court order the State could not force a suspect

to undergo a minor surgical procedure to remove a bullet lodged one inch under his skin. 470 U.S. at 766. These two cases hardly support petitioners' argument that in this case blood and urine tests should be permitted in the absence of any suspicion at all.

Although the searches involved in this case are highly intrusive, they are not highly productive. In fact, they do not come even close to being "sufficiently productive mechanism[s]" to justify the great intrusion upon personal privacy that they entail. The FRA's own statistics show that during the first two years of testing, only 5% of those tested showed evidence of alcohol or illicit drug use. Jt. App. 193. Put another way, 1432 of the 1508 employees subjected to invasive blood and urine tests during the two-year period showed no evidence of alcohol or illicit drug use. The FRA's

statistics do not reveal what proportion of the 5% who tested positive were later found to have contributed to the accident or incident that gave rise to the test. Because all members of train crews and all other "covered" employees (including employees who could not possibly have caused the accident or incident) are given the tests, the 5% figure is certainly a substantial exaggeration of the percentage of incidents caused by alcohol or illicit drug use.

As we point out above, other, less intrusive measures are likely to be much more productive mechanisms for detecting employee impairment due to drug or alcohol use or other causes. Adequate supervision, field sobriety and neurobehavioral tests (unlike blood and urine tests) detect impairment and do so in a noninvasive, nonintrusive way. In order to serve its asserted interest, the

government has chosen a highly intrusive, marginally productive mechanism. Such a mechanism is not "reasonably related in scope" to the government interests it allegedly serves.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

James D. Holzhauer*
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

*Counsel of Record

John A. Powell
Stephen R. Shapiro
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

Harvey Grossman
Roger Baldwin Foundation
of ACLU
20 East Jackson Street
Chicago, IL 60604
(312) 427-7330

Edward M. Chen
American Civil Liberties
Union of Northern
California, Inc.
1663 Mission Street
Suite 460
San Francisco, CA 94103
(415) 621-2493

SEPTEMBER, 1988

87-1555
No. 86-1555

FILED
JUL 28 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF
TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF THE AMICUS CURIAE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE PETITIONERS**

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
STEPHEN C. YOHAY
GAREN E. DODGE *
MCGUINNESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Attorneys for Amicus Curiae
Equal Employment
Advisory Council*

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	8
ARGUMENT	10
POST-ACCIDENT DRUG TESTING BY AN EM- PLOYER IN A SAFETY SENSITIVE INDUSTRY NEED NOT BE PRECEDED BY INDIVID- UALIZED SUSPICION OF EACH EMPLOYEE TESTED IN ORDER TO BE "REASONABLE" WITHIN THE MEANING OF THE FOURTH AMENDMENT	10
I. To Be Lawful Under The Fourth Amendment, An Employer's Program Need Only Be Reason- able At Its Inception And In Its Scope	10
II. Because Of The Strong Safety Concerns Present In Some Occupations—Like The Railroad Indus- try—It Can Be "Reasonable At Inception" For An Employer To Institute A Post-Accident Drug Test Without Having Individualized Suspicion	11
III. Because The FRA's Rules Are Reasonably Re- lated To Their Objectives, And Not Excessively Intrusive, They Are "Reasonable In Scope"	19
CONCLUSION	23

TABLE OF AUTHORITIES

Cases:	Page
<i>Allen v. City of Marietta</i> , 601 F. Supp. 482 (N.D. Ga. 1985)	16
<i>American Federation of Government Employees v. Dole</i> , 670 F. Supp. 445 (D.D.C. 1987)	19
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	19
<i>Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.</i> , 838 F.2d 1087, cert. filed (No. 87-1631) (April 1, 1988)	passim
<i>Camara v. Municipal Court</i> , 387 U.S. 523 (1967)	10
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982)	5
<i>Division 241 Amalgamated Transit Union v. Suscy</i> , 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976)	9, 15
<i>Jones v. McKenzie</i> , 833 F.2d 335 (D.C. Cir. 1988), cert. filed (No. 87-1706) (April 15, 1988)	9, 16
<i>Lovvorn v. City of Chattanooga</i> , 46 EPD ¶ 37,972 (6th Cir. 1988)	18
<i>McDonell v. Hunter</i> , 809 F.2d 1302 (8th Cir. 1987)	17
<i>Mullholland v. Department of the Army</i> , 660 F. Supp. 1565 (E.D. Va. 1987)	20
<i>National Ass'n of Air Traffic Specialists v. Dole</i> , No. A97-073, unpublished slip op. (D.C. Alaska, March 27, 1987)	18
<i>National Treasury Employees Union v. Von Raab</i> , 649 F. Supp. 380 (E.D. La. 1986), rev'd, 816 F.2d 170 (5th Cir. 1987), petition for cert. granted, Feb. 29, 1988	5, 17
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	9, 15, 19
<i>O'Connor v. Ortega</i> , 107 S.Ct. 1492 (1987)	passim
<i>Rushton v. Nebraska Public Power District</i> , 844 F.2d 562 (8th Cir. 1988)	18
<i>School Board of Nassau County v. Arline</i> , 107 S. Ct. 1123 (1987)	5
<i>Shell Oil Co. v. Oil, Chemical and Atomic Workers</i> , 84 LA 562 (BNA) (1985)	3
<i>Texas Utilities Generating Co.</i> , 82 LA 6 (BNA) (1983)	3

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Place</i> , 462 U.S. 696 (1983)	10
<i>Watson v. Fort Worth Bank & Trust</i> , — S. Ct. — (No. 86-6139)	5
<i>Constitution and Federal Statutes:</i>	
U.S. Const. Amend. IV	passim
National Labor Relations Act, 29 U.S.C. § 141 et seq. (1982)	3
Railway Labor Act, 45 U.S.C. § 151 et seq. (1982) ..	3
<i>Federal Regulations:</i>	
49 C.F.R. § 219.1(a)	5
49 C.F.R. § 219.101	22
48 Fed. Reg. 30724 (1983)	9, 13
49 Fed. Reg. 24253-1 (June 12, 1984)	6, 13
53 Fed. Reg. 8368 (March 14, 1988)	14, 19
<i>State Statutes:</i>	
Conn. Pub. Act No. 87-551 (1987)	3, 19
Iowa Code § 730.5 (1987)	3
1987 La. Act 461	3
Minn. Stat. § 181-950 et seq. (1987)	3, 19
Mont. Code § 39-2-304 (1987)	3, 19
1987 Vt. Act § 61	3
<i>Federal Legislative and Administrative Proposals:</i>	
H.R. 4567, 100th Cong., 2d Sess. (1988)	4
H.R. 4717, 100th Cong., 2d Sess. (1988)	4
Federal Aviation Administration Notice of Proposed Rulemaking, 53 Fed. Reg. 8368 (March 14, 1988)	14, 19
<i>Miscellaneous:</i>	
National Institute on Drug Abuse, <i>Highlights of the 1985 National Household Survey on Drug Abuse</i> (Nov. 1986)	14
Walsh, J. Michael, and Yohay, Stephen C., <i>Drug and Alcohol Abuse: A Guide to the Issues</i> (National Foundation for the Study of Equal Employment Policy (1987)	5, 21

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 86-1555

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF
TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF THE AMICUS CURIAE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE PETITIONERS**

The Equal Employment Advisory Council (EEAC or Council) respectfully submits this brief as amicus curiae in support of the Petitioners. The parties' written consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote sound approaches to the elimination of discriminatory employment practices. Its member-

ship consists of a broad segment of the employer community in the United States, including individual employers as well as several trade associations which themselves have hundreds of corporate members. The members of EEAC are committed firmly to the principles of nondiscrimination and equal opportunity in employment.

The Council's members, and the constituents of its trade association members, are deeply concerned about the problem of drug and alcohol abuse in the nation, and many have implemented programs addressing substance abuse in their workplaces. Often, these programs include drug and alcohol testing, for both applicants and current employees. Many of these programs, in fact, are based on safety concerns similar to those articulated by the Federal Railroad Administration (FRA) as justification for its regulations at issue herein. Many private sector programs, like the FRA rules herein, permit testing of a particular worker for "cause," and also require testing after an accident resulting in death, serious injury or significant property damage.

EEAC has a direct and substantial interest in this case. First, several of its members, as rail operators, are directly affected by the regulations struck down by the Ninth Circuit below. Just as importantly, the testing programs adopted by other EEAC members will be affected by constitutional concepts such as "cause" and "individualized suspicion" at issue herein—even though, as private sector companies, they are not subject directly to the Fourth Amendment's prohibition against unreasonable searches and seizures. For example, several states have enacted legislation barring private sector employers from requiring drug

tests in the absence of some degree of cause,¹ while others permit testing without individualized suspicion for employees who work in high risk or dangerous occupations.²

Also, many EEAC members have collective-bargaining relationships with unions which are regulated under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* (1982), and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1982). In many instances, these agreements address the issue of substance abuse testing, and in evaluating the propriety of substance abuse programs under these agreements, arbitrators sometimes rely upon constitutional concepts.³ Moreover, if the Ninth Circuit's ruling is allowed to stand—including its strained interpretation of "state action"⁴—private employers will unjustifiably be sub-

¹ See, e.g., Conn. Pub. Act No. 87-551 (1987); Iowa Code § 730.5 (1987); 1987 La. Act 464; Minn. Stat. § 181.95 *et seq.* (1987); Mont. Code § 39-2-304 (1987); R.I. Gen. Laws § 28-6.5-1 (1987); and 1987 Vt. Act § 61.

² See Conn. Pub. Act No. 87-551 (requiring employers to have "reasonable suspicion" in order to test most workers, but permitting random testing for employees who serve in an occupation which has been "designated as a high-risk or safety sensitive occupation"); Minn. Stat. § 181.950, *et seq.* (random testing permitted for "safety sensitive positions"); Mont. Code § 39-2-304 (testing permitted for applicants in "hazardous work environments").

³ See, e.g., *Shell Oil Co. v. Oil, Chemical and Atomic Workers International Union*, 84 LA 562, 565 (BNA) (1985); *Texas Utilities Generating Co.*, 82 LA 6 (BNA) (1983).

⁴ The Ninth Circuit ruled that the Fourth Amendment "applies to drug tests conducted at the instigation of the railroads

ject to the Fourth Amendment whenever the federal government even "encourages" drug tests by private employers. In fact, in *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087, cert. filed (No. 87-1631) (April 1, 1988), the Ninth Circuit recently read Fourth Amendment privacy protections into a union's relationship with its private sector employer without any action by the federal government whatsoever.⁵ Accordingly, EEAC

adopted by the FRA." *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 579. In doing so, the court ruled, in part, that "the federal government's role in promulgating the regulations in question is sufficient government action to subject the tests to the limitations of the fourth amendment." *Id.* The court explained that even "mere encouragement" of a search by the federal government triggered state action. *Id.* at 581.

Such a concept presents serious and far-reaching potential implications. For example, an amendment that would prohibit federal funds from being expended in any workplace which is not free from the illegal use of controlled substances was approved on May 17, 1988, by the House of Representatives. The amendment was offered by Representative Robert Walker (R-PA) to H.R. 4567, 100th Cong., 2d Sess. (1988), to the Energy and Water Appropriations bill. Another bill, H.R. 4717, 100th Cong., 2d Sess. (1988), passed the House Government Operations Committee on June 29, 1988. It requires federal contractors to certify that they are providing drug-free workplaces. It is likely that the Ninth Circuit's version of "state action" would be triggered under these two amendments, subjecting all employers who receive federal funds under one of the covered programs to the Fourth Amendment.

⁵ *Burlington Northern*, 838 F.2d 1087, is currently on a petition for a writ of certiorari with this Court (No. 87-1631). In its decision, the Ninth Circuit, unexplainably, "decline[d] to assume that [the union] implicitly granted [Burlington] the authority to invade their privacy in ways the government could not." *Id.* at 1093.

has a substantial interest in this Court's inquiry into whether an employer must have "individualized suspicion" in order to test those employees who present grave safety risks to themselves and others, as well as what kinds of safety risks, if any, can justify testing after an accident or major rule violation.

Because of its interest in the issues associated with substance abuse, EEAC, through a closely related foundation funded by its members, sponsored the preparation of a monograph titled *Drug and Alcohol Abuse: A Guide to the Issues*, by J. Michael Walsh, Ph.D. and Stephen C. Yohay, published in 1987 by the National Foundation for the Study of Equal Employment Policy. In addition, EEAC filed an amicus curiae brief in *National Treasury Employees Union v. Von Raab*, No. 86-1879 (a companion case to the instant case), as well as an amicus brief in support of the Petition for a Writ of Certiorari in *Burlington Northern Railroad Co. v. Brotherhood of Locomotive Engineers*, *supra*. More generally, as a broadly-based national organization, EEAC has filed many amicus briefs with this Court. Some of these cases include *Watson v. Fort Worth Bank & Trust*, — S. Ct. — (No. 86-6139); *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

STATEMENT OF THE CASE

The Federal Railroad Administration (FRA), after a two-year investigation and comment period, promulgated extensive regulations designed "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." 49 C.F.R. § 219.1(a). Recognizing that

there had been 34 fatalities, 66 injuries and over \$28 million in property damage in the period between 1975 and 1983, 49 Fed. Reg. 24254 (June 12, 1984), the FRA decided that its regulations should address the drug and alcohol problem in two ways. Subpart C of its regulations, accordingly, requires railroads to test employees who are directly involved in a "major train accident"—one involving a fatality, \$500,000 damage to railroad property, or the release of hazardous materials; an "impact accident"—one involving a reportable injury or damage to railroad property of \$50,000; or an accident that involves a fatality to a co-worker. Subpart D, on the other hand, authorizes (but does not require) railroads to give tests whenever a supervisor, after a reportable accident, has reasonable suspicion that an employee contributed to the occurrence or severity of an accident; or when railroad rules—such as failure to stop or excessive speeding—are violated.⁶

The Railway Labor Executives' Association (RLEA) brought suit, seeking to enjoin the implementation of the FRA's regulations. The district court, in an opinion from the bench, granted the government's motion for summary judgment. The Ninth Circuit reversed, however, ruling that the FRA's rules improperly permitted unreasonable searches and seizures in violation of the Fourth Amendment. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 587-589 (9th Cir. 1988). In doing so, the Ninth Circuit cited the standard established by this Court

⁶ Subparts C and D contain other drug testing provisions that were not struck down by the Ninth Circuit. Those provisions are not at issue in this case and are not addressed in this brief.

in *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987), that a search must be justified both at its inception and in its scope. The Ninth Circuit held that a drug test would not be justified at its inception because the rules did not have a "individualized suspicion" requirement: "Accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." 839 F.2d 575 at 587. The court then stated in *dicta* that even if the tests were reasonable at their inception, they still are not reasonable in scope because the "tests cannot measure current drug intoxication or degree of impairment." *Id.* at 588.

In a dissenting opinion, however, Judge Alarcon took issue with the majority's reasoning. Noting that drug usage among railroad workers has been implicated in numerous deaths, injuries and damage, and that the majority failed to properly balance the government's interests along with those of the railroad employees, Judge Alarcon indicated that he would hold that the FRA's rule is "justified at the inception." He reasoned:

I would hold that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests. As recent history attests, locomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands. The threat imposed by drug or alcohol impaired railroad workers transporting hazardous materials across this nation is far graver than the potential danger presented by

the customs the officers . . . the prison guards . . . or . . . the transportation workers in [other cases].

Id. at 569 (emphasis in original). In addition, he stated that the tests can be performed “in the absence of individualized suspicion,” that they are not excessively intrusive, and that they are “reasonably related to the objective of determining whether railroad workers are intoxicated on the job.” *Id.* at 596-98.⁷

SUMMARY OF ARGUMENT

In *O'Connor v. Ortega*, 107 S. Ct. 1492, 1503 (1987), the Supreme Court held that a search of an employee by an employer subject to the Fourth Amendment must be both reasonable at its “inception” and reasonable in its “scope.” This Court should hold that a drug and alcohol testing program, like the one adopted in the FRA in its regulations herein, can be reasonable at its “inception” even if supervisors do not have “individualized suspicion” that a particular employee caused a workplace accident. Such a holding is justified herein because railroad companies have a “work-related” purpose to administer post-accident tests—to maintain “supervision, control and the efficient operation of the workplace.” *Id.* at 1499.

In addition, such a testing program is reasonable at inception because statistics reveal significant on-the-job substance use and impairment among rail employees, such that there is reason to believe that a post-accident test will “turn up evidence . . . of work-

⁷ This brief does not address the issue of whether taking of the urine, or its examination, constitute a “search or seizure.”

related misconduct.” *Id.* Statistics cited during the FRA’s rulemaking, in fact, noted that 23% of all operating personnel were problem drinkers, and that one out of eight rail workers drank while on duty during the study year. 48 Fed. Reg. 30724 (1983).

Moreover, this Court in *O'Connor* left open the possibility that other types of searches—besides “work-related” searches and “investigations of misconduct”—would be permitted under a lessened standard, one that does not require individualized suspicion. *Id.* at 1503. The *amicus* submits that this case, which presents grave safety risks to co-workers and members of the public, presents an opportunity to recognize such a lessened standard. Several courts of appeals, in fact, have ruled that strong safety considerations permit certain employers to administer periodic or post-accident tests. Two such courts of appeals’ decisions have even involved employers in the transportation industry under facts that are close to the ones presented herein. See *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *cert. filed* (No. 87-1706) (April 15, 1988); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

In addition to being reasonable in their inception, the FRA’s rules are reasonable in their “scope.” First, the FRA’s rules are “reasonably related to the objectives of the search,” *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)—that is, they seek in part, to deter train operators from drinking or taking drugs while on duty. Significantly, other means of alcohol and drug detection—such as background investigations and supervisor observation of workplace performance—will not be as effective as FRA’s testing program. Second, the FRA rules not not “excessively

intrusive," *id.*, a point conceded by the Ninth Circuit below, because the intrusiveness of the actual tests themselves have "been reduced as much as practicable." 839 F.2d at 589.

ARGUMENT

POST-ACCIDENT DRUG TESTING BY AN EMPLOYER IN A SAFETY SENSITIVE INDUSTRY NEED NOT BE PRECEDED BY INDIVIDUALIZED SUSPICION OF EACH EMPLOYEE TESTED IN ORDER TO BE "REASONABLE" WITHIN THE MEANING OF THE FOURTH AMENDMENT

I. To Be Lawful Under the Fourth Amendment, An Employer's Program Need Only Be Reasonable At Its Inception And In Its Scope

The Fourth Amendment requires searches by an employer subject to the Fourth Amendment to be "reasonable." This Court has ruled that to determine whether a search is reasonable requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983); *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967). In the workplace context, the seminal case of *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987) (plurality opinion) made clear that this balancing must include the weighing of "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Id.* at 1499. In *O'Connor*, this Court went on to hold that:

public employer intrusions on the constitutionally protected privacy interests of government

employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable."

Id. at 1502-03 (emphasis supplied).

This two-fold inquiry, "reasonable at inception" and "reasonable in scope," therefore, serves as the starting point for determining the legality of the FRA's drug testing rules. As we show below, because of the FRA's need to maintain "supervision, control and the efficient operation of [its] workplace," *id.* at 1499, its rules are reasonable under both grounds—and this Court should hold that an employer need not always have "individualized" suspicion in order to meet that standard.

II. Because Of The Strong Safety Concerns Present In Some Occupations—Like The Railroad Industry—It Can Be "Reasonable At Inception" For An Employer To Institute A Post-Accident Drug Test Without Having Individualized Suspicion

In *O'Connor*, this Court explained at least two ways in which a search can be "justified at its inception": there either can be "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of *work-related misconduct*, or that the search is necessary for a noninvestigatory *work related purpose*." 107 S.Ct. at 1503 (emphasis supplied). The Ninth Circuit below, however, made a fundamental mistake in its legal analysis. It recognized only one of the two possible justifications discussed in *O'Connor*, "reasonable grounds

for suspecting that the search will turn up the evidence sought." 839 F.2d at 587. Had the Ninth Circuit recognized (and properly discussed) the possibility that railway companies have a "noninvestigative work-related purpose" in administering certain drug tests, this case likely would have led to a different conclusion.

Under that neglected standard, it is obvious that railroads have a "work related purpose" in ferreting out (and deterring) drug use by their workers. As Justice Alarcon stated in his dissent:

Drug usage among railroad personnel has been implicated as a potential cause of numerous train accidents which resulted in injury and death. Two such accidents are noted in the companion cases to this matter, *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 838 F.2d 1087. These accidents caused seven deaths and over \$3 million in property damage. These tragic events were not isolated incidents. They are two examples of a long line of alcohol or drug-related tragedies. See generally T. Manello & F. Seaman, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads* . . . The threat posed by alcohol and drug-related railroad accidents is particularly dangerous in light of the fact that extremely hazardous materials are often transported by rail . . . *Railroad Accident Report—Derailment of Illinois Central Gulf Railroad Freight Train Extra 9629 East (GS-2-28) and Release of Hazardous Materials at Livingston, Louisiana, September 28, 1982* (1983) (describing an alcohol-implicated train wreck which resulted in a chemical spill requiring the evacuation of a community of 3000 persons for a period of two weeks.

839 F.2d at 594. An employer clearly has a "work related purpose" to test employees for drug use, not necessarily to investigate and penalize particular workers, but to deter and prevent further injury and destruction of property.

Moreover, the Ninth Circuit erred in discussing the one standard that it recognized, "reasonable grounds" to believe railroad companies will "turn up evidence" of drug or alcohol use. Comments during the FRA's rulemaking "confirmed that alcohol and drug use does occur on the railroads with unacceptable frequency, despite existing rules and programs." 49 Fed. Reg. 24253 (June 12, 1984). The statistics from a 1979 study, in fact, are truly shocking. They reveal that:

"19% of all employees were 'problem drinkers'"; "23% of operating personnel were 'problem drinkers'"; . . . [o]nly 4% of problem drinkers were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures"; "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year (1978)"; "13% of workers reported to work at least 'a little drunk' one or more times during that period"; "13% of operating employees drank while on duty at least once during the study year, averaging about 3 such instances during the year"; and "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year."

Petition for a Writ of Certiorari at 3 n.1, citing 48 Fed. Reg. 30724 (1983).⁸ On a more down to earth

⁸ These numbers reflect the pervasive drug use in the nation in general, and the workplace specifically. For example, the

level, the brakeman involved in the January 4, 1987 Conrail accident near Chase, Maryland testified that he used marijuana with his co-workers "probably" more than ten times (and "maybe" more than 20 times) during 1986 alone. See Brief Amicus Curiae of Thomas Colley, *et al.*, in support of Petition for Certiorari (Colley Brief) at 6. Accordingly, these statistics reveal that there is reasonable grounds to believe that post-accident tests given pursuant to the FRA's rules will "turn up evidence" of drug or alcohol use, a clear justification to test under *O'Connor*.

Even more important than these two exceptions, this Court in *O'Connor* stated that there are a plethora of "other types of employer intrusions"—besides

1985 National Household Survey on Drug Abuse compiled by the National Institute on Drug Abuse (NIDA) reports that 19% of all Americans over twelve years of age have used an illicit drug in the last year. *1985 National Household Survey on Drug Abuse*, NIDA Capsule, National Institute on Drug Abuse (October, 1986), cited in *Notice Of Proposed Rulemaking*, FAA Anti-Drug Program, 53 Fed. Reg. 8368 (March 14, 1988). Particularly alarming for employers are data indicating that in the 20-40 year old population—those currently entering the workforce—65 percent have used illicit drugs, and 42 percent of those studied have done so within the last year. Among employed 20-40 year olds, 29% reported use of an illicit drug in the past year, and 19% reported some illicit drug use at least once in the past month. *Id.*

In fact, in a poll conducted by a Cocaine National Help Line in New Jersey, 75 percent of 227 drug users admitted to using illegal drugs *on the job*; 61 percent said that the drugs interfered with their work performance; 44 percent stated that they *sold* drugs to other employees; 18 percent admitted to having had a drug related accident; and 18 percent admitted that they had *stolen* from their employers to support their drug habits.

the "work-related searches" and "investigation of workplace misconduct" directly involved in that case—in which employers should be permitted to search. *Id.* at 1501. Significantly, the Court implied that some of these searches should be under an even lesser standard, not necessarily one requiring "individualized suspicion." *Id.* at 1503. This case, which presents grave safety concerns,⁹ presents such a situation.

Indeed, several reasoned courts of appeals' decisions recognize the need for employers to be able to test for safety reasons absent individualized suspicion. In *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), a case that involves safety issues in the transportation industry, a bus drivers' union challenged the requirement that employees submit to a "blood and urine test when they are involved in 'any serious accident.'" *Id.* at 1266. The Seventh Circuit, reasoning that the employer had a "paramount interest in protecting the public," found the tests to be constitutional: "Certainly the public interest in the safety of mass transit

⁹ A rule permitting drug screens absent individualized suspicion is especially appropriate in the instant case. First, the railroad companies herein are not acting in a "law enforcement" capacity when they give a drug test. Rather, the railroads (like many of EEAC's members) are acting as "employers"; they are seeking to maintain "supervision, control and the efficient operation of the workplace." *O'Connor* at 1499. And, as this Court made clear, outside the "law enforcement" context, traditional "'probable-cause requirement[s] become] impracticable" for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct. *Id.* at 1501, citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Id.* at 1267.

In another transportation case, *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), the District of Columbia imposed a mandatory testing program in response to "repeated incidents of bizarre or dangerous drug-related behavior by [bus] drivers and attendants while on duty." *Id.* at 336. The D.C. Circuit, while recognizing that the tests intrude heavily upon the employees' privacy interests, nonetheless noted that those interests "can be outweighed only by strong governmental concerns." *Id.* at 340. Stressing the "serious safety concerns" *id.* (emphasis in original) by the government employer, the court held that the employer "acted pursuant to a significant and compelling governmental interest" as follows:

There can be no doubt whatsoever that the School System's mission of safely transporting handicapped children to and from school cannot be ensured if employees in the Transportation Branch are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous. The case law on this point is clear that a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or of others.

Id. (emphasis supplied), citing *Allen v. City of Marietta*, 601 F.Supp. 482 (N.D. Ga. 1985) (mandatory drug tests permitted for workers around high-voltage wires in view of reports of drug use). A fortiori, it is "preposterous" for the RLEA to suggest that individualized suspicion should be required where even more compelling safety concerns—tremendous property damage, injury and loss of life—

are presented by a train accident under the facts herein.

Other cases reject an "individualized suspicion" requirement in light of strong safety concerns. *NTEU v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), cert. granted, a case that is noted as addressing primarily the Customs Service's need to preserve the integrity of its interdiction operations, also addressed safety concerns. The court noted that "those employees involved in field operations, particularly if carrying firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use." *Id.* at 178. The court went on to state that the following factors, among others, made Customs' program reasonable: 1) that Customs attempted to minimize the intrusiveness of the search; 2) that Customs has a demonstrated need for its program given their pernicious impact of drugs on society; 3) that the sample is taken in the most private facility practicable; 4) that Customs has responsibilities as an "employer of private citizens"; 5) that less-intrusive measures were considered; and 6) that Customs' program is effective, primarily because drug users may choose not to seek sensitive positions. *Id.* at 177-180.

Similarly, in *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), the Iowa Department of Corrections required correctional officers to submit to urine, blood and breath testing at the request of Department officials. The Eighth Circuit, finding that the Department had a compelling need to determine "whether corrections employees are using or abusing drugs which would affect their ability to safely perform their work within the prison," *id.* at 1308, held that

"urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons." *Id.* See *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (upholding testing of nuclear power plant employees); *National Ass'n of Air Traffic Specialists v. Dole*, No. A97-073, unpublished slip op. (D.C. Alaska, March 27, 1987) (upholding testing of flight service specialists), cited in *Lovvorn v. City of Chattanooga*, 46 EPD ¶ 37,972 (6th Cir. 1988).¹⁰

As a result, this Court should adopt the rule that, given the serious safety risks posed by workplace drug abuse, it can be reasonable "at inception" for

¹⁰ As an example of poor reasoning—with potentially devastating consequences—the Sixth Circuit in *Lovvorn* struck down the city's testing of fire fighters because the potential harm to society would not be "catastrophic." *Id.* at 52,069. The court, in adopting a so-called "continuum of employment categories" analysis, reasoned:

In the case of fire fighters, the harm to society of a fire fighter being impaired may be significant. Furthermore, those losses, especially when it is in the form of lost lives, are irretrievable. Nevertheless, it would appear that the likelihood of enormous losses being imposed on society because of an impaired fire fighter is significantly lower than with impaired air traffic controllers and nuclear plant employees who literally hold thousands of lives in their hands every day. That does not describe the typical day of a fire fighter.

Id. (citations omitted). Judge Guy, in dissenting from such an ill-conceived analysis, stated it correctly: "There is no right, constitutional or otherwise, to be impaired for duty or to engage in illegal usage." *Id.* at 52,081.

an employer to institute a drug testing program without necessarily having individualized suspicion.¹¹

III. Because The FRA's Rules Are Reasonably Related To Their Objectives, And Not Excessively Intrusive, They Are "Reasonable In Scope"

As this Court stated in *O'Connor*, "[t]he search will be permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'" 107 S. Ct. at 1503, citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

First, in finding that the FRA rule was not reasonable in scope, the Ninth Circuit noted that the FRA did not choose the "least intrusive" means of

¹¹ Such a rationale, in fact, serves as the impetus behind the approach recently taken by the Department of Transportation for the testing of other private sector employees subject to its regulation. For example, the Federal Aviation Administration, in its Notice of Proposed Rulemaking, 53 Fed. Reg. 8368 (March 11, 1988), stated that it intends to permit random screens for employees in "sensitive safety- and security-related jobs." See *American Federation of Government Employees v. Dole*, 670 F. Supp. 415 (D.D.C. 1987). In addition, several states that have chosen to regulate workplace drug testing have adopted such an approach. For example, Connecticut requires employers to have "reasonable suspicion" in order to test most workers, but permits random testing for employees who serve in an occupation which has been "designated as a high-risk or safety sensitive occupation." Conn. Pub. Act No. 87-551 (1987). See Minn. Stat. § 181.950, *et seq.* (random testing permitted for "safety sensitive positions"); Mont. Code § 39-2-301 (testing permitted for applicants in "hazardous work environments").

drug detection. *Id.* at 589. The court reasoned that an "individualized suspicion" requirement would render the drug procedure the "least intrusive" means of drug detection, and that the program thus will serve "reasonably well" to prevent on-the-job use of alcohol and drugs. 839 F.2d at 589.

Amicus submits that employers should not have to reply upon the "least intrusive" means of detecting drug use, or one that works "reasonably well," particularly where serious safety concerns are involved. For example, supervisor monitoring—a less intrusive means of detecting drug use—proved insufficient to prevent the train accident on January 4, 1987 near Chase, Maryland, involving a Conrail train driven by Ricky L. Gates. See Colley Brief. As the Fifth Circuit in *Von Raab* made clear, drug use is not always easy to detect just through supervisor monitoring:

Alternative sources of information do not eliminate the need for urine testing. Although the Service has had an opportunity to observe the performance of employees while they were working in non-sensitive positions, this provides scant basis on which to evaluate their integrity and reliability should they be assigned to work in sensitive positions.

816 F.2d at 180. See *Mullholland v. Department of the Army*, 660 F. Supp. 1565, 1569 (E.D. Va. 1987) (observation "provides little basis on which to assess their drug-free reputation and reliability of applicants for sensitive positions").

Neither is it effective simply to conduct background investigations of train operators. Interviewees may be "reluctant to disclose their knowledge of the employee's drug use or may be unaware of his use,

either because the employee has not disclosed this activity or because he has submitted names of only those references who do not know of his use." 816 F.2d at 180. Moreover, "background investigations are themselves intrusive invasions of an individual's privacy." *Id.* In fact, background investigations are less desirable as a means of detection because of the possibility of damage to an employee's reputation where questions are raised about potential drug usage.

Second, the Ninth Circuit made a fundamental error in ruling that the FRA rule was not reasonable in scope: the court shifted the focus of the inquiry into whether the tests detect "current drug intoxication or degree of impairment." 839 F.2d at 588-89. Whether an employee is actually physiologically impaired at the moment a urine or blood sample is taken is not the only point of drug testing because on-the-job impairment is only *one* of the problems presented by the employee who abuses drugs. As stated in the monograph *Drug and Alcohol Abuse in the Workplace*:

The sociopathy (drug seeking, drug dealing, drug using, etc.) associated with drug abuse can have serious adverse effects on job performance, teamwork, cohesiveness of the workforce, and morale. The various legal, financial, ethical, and moral issues that are involved place considerable pressure on the substance abuser. Avoiding detection, generating sufficient funds to purchase drugs, and associating with other substance abusers for support and approval are activities which consume a considerable portion of a substance abuser's day.

Id. at 22. Given such impulses, "drug abuse should be viewed as a kind of 'infectious' disorder, in that it can be spread rapidly through the workforce by employees who are known to be using drugs," *id.* Clearly, the Ninth Circuit misapprehends the true nature of "substance abuse" and its infectious tendencies—an infection that has spread throughout the rail industry, and which the FRA rules seek to eliminate.

Indeed, detecting current impairment is not the sole objective of the FRA regulations. Rather, the FRA rules are designed to deter drug and alcohol possession, use and intoxication, as well as deterring employees from working while under the influence. 49 C.F.R. § 219.101. See 839 F.2d at 587. Obviously, when these deterrence objectives are properly brought into the inquiry, it becomes clear that the FRA post-accident testing rules are reasonably related to their objectives.

Such a deterrence objective is not a "flaw" in the FRA's program, as the Ninth Circuit is wont to call it. 839 F.2d at 588. Rather, deterrence is the *essence* of the program. If employees know they may be detected, they are less likely to operate a train while drinking or using drugs. For a job that involves extreme safety risks and dangers, it should be sufficient to keep someone from working who tests positive for drugs after an accident or major rule violation, even if, *arguendo*, such a positive result is merely an indication that the operator has used drugs "somewhere in the recent past." For the use of drugs in the recent past is an indication of that worker's propensity to use drugs in the *future*—a gamble railroads and other safety sensitive employers should not be forced to make. Had Ricky Gates' pro-

pensity to use drugs and alcohol been uncovered earlier—perhaps after a rule violation—a major train accident could have been avoided.¹²

The Ninth Circuit clearly failed to recognize the need for deterrence of drug use in a safety sensitive occupation. This Court, therefore, should hold that FRA's drug testing regulations were reasonable at their inception and reasonable in their scope, and that an employer need not necessarily have "individualized suspicion" for its program to be reasonable.

CONCLUSION

For these reasons, and those expressed by the Petitioner, EEAC respectfully submits that the decision of the Ninth Circuit below should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
STEPHEN C. YOHAY
GAREN E. DODGE *
MCGUINNESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
*Attorneys for Amicus Curiae
Equal Employment
Advisory Council*

July 28, 1988

* Counsel of Record

¹² In addition, the FRA's rules are not excessively intrusive. The Ninth Circuit majority, in fact, conceded that the "manner of conducting the tests is generally reasonable in that they are performed in medical facilities," and that the "intrusiveness of the process of urine testing has been reduced as much as practicable in that only personnel of the medical facility may supervise the sample collection." 839 F.2d at 589.